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## Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject

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# DISPUTE PROCESSING IN LAW AND LEGAL SCHOLARSHIP: FROM INSTITUTIONAL CRITIQUE TO THE RECONSTRUCTION OF THE JURIDICAL SUBJECT\*

SUSAN SILBEY\*\* AND AUSTIN SARAT\*\*\*

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## I. INTRODUCTION

Though talk about disputing has, for a long time, been common in labor and international relations, as well as on baseball fields and playgrounds, it is only recently that such talk has begun to occupy an important place in law. Arguments in legal scholarship and scholarship about law,<sup>1</sup> as well as struggles over law reform, have increasingly occurred on a terrain marked by language of disputing, dispute processing, and dispute resolution. These arguments and struggles divide legal scholars and practitioners and raise questions about the nature and function of

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1. Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175 (1973). Some have talked about reformulating many important legal concepts and problems using that language. See Trubek, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727 (1980-81). Others resist the incursions of such discourse into the domain of law. See Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

courts, the relation of legal scholarship to broader intellectual and political movements, and the status of individual rights and entitlements.

The debate about dispute processing within law entails a competition of ideas about the role of lawyers and a competition of interests within the market for legal services. Some welcome the turn to disputing and dispute processing as a relatively straightforward extension of traditional professional concerns with judicial procedure.<sup>2</sup> They seek to extend the reach of the legal field to encompass new forms of dispute processing and to build alliances with dispute processing professionals.<sup>3</sup> Others believe that thinking about law in terms of disputing and dispute processing threatens basic commitments and values of lawyers and the legal system.<sup>4</sup>

The debate about dispute processing also entails a struggle over appropriate ways to study law. For some researchers, the effort to describe legal practice as a particular form of dispute processing furthers the social scientific ambition to observe and report on social action free of cultural and professional biases. They hope to develop neutral concepts and units of analysis, such as the dispute, to facilitate comparative analysis of the widest range of social behaviors and institutions, including the law, without reproducing the assumptions of those institutions. For these scholars, the turn to dispute processing promotes thus legitimates the role of social scientists in legal scholarship.<sup>5</sup> For others, however, it challenges the singular importance of the legal system in the social order, and threatens the special authority of the legal profession to both study and minister to the law.

This paper describes and assesses struggles over disputing and dispute processing within the legal field. We see the clash between traditional legal authorities and proponents of new forms of dispute processing as a struggle over the definition of the space of law in society.<sup>6</sup> We believe that this contest both transforms the law and reaffirms its importance in social life. As judges and mediators compete within a market for dispute resolution services, the law is challenged and redefined. As Dezalay puts it,

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2. See Rifkind, *Are We Asking Too Much of Our Courts?* 70 F.R.D. 96 (1976); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

3. See Bordieu, *The Force of Law: Toward A Sociology of the Judicial Field*, 38 HASTINGS L.J. 805 (1987). The term legal field is derived from what Bordieu calls the "juridical field." In his work a field is an area of structured, socially defined activity or practice, especially professional activity. "If one wanted to understand the 'field' metaphorically, its analogue would be a magnet: like a magnet, a social field exerts a force upon all those who come within its range. But those who experience these 'pulls' are generally not aware of their source." Bordieu's conception of the juridical field invites examination of internal conflicts and politics in the legal profession which, in his view, exert a pervasive influence on every aspect of law. Such conflicts are associated with hierarchies of power and prestige within and attached to legal work and legal institutions. Professionals within the legal field are constantly engaged in a struggle with others outside the field to sustain their conception of law's appropriate internal organization and relation to the social whole.

4. See Fiss, *supra* note 1.

5. Bok, *A Flawed System*, HARV. MAG. 38 (1983).

6. T. Dumm, *The Fear of Law* (1989) (to be published in volume 10 of *Studies in Law, Politics and Society*).

The ceaseless struggle and opposition between these two concepts of justice [adjudication and mediation] must not however conceal their complementarity; it is a division of labor which allows simultaneously for the autonomy of law, its transcendence within time and social space and its permanent updating in accordance with social transformations. Both of these modes of justice, no matter how antagonistic they appear, represent essential components of the belief in law, and from there of the very survival of a field of professional practices.<sup>7</sup>

Like Dezalay, we see dispute processing as an addition to, rather than a displacement of, the legal field. The discourses of dispute processing frame a more layered and complex set of legal practices.

Yet the complementarity of dispute processing within the legal field cannot mask what Dezalay describes as a competition between an array of "goodfellows" who insist upon "a natural pre-existing need for community justice," who seek expanded but less expensive state control of socially troubled persons, and those who want to annex to legal practice and the service of capital techniques previously considered the exclusive prerogative of social welfare practitioners.<sup>8</sup> The dispute processes and programs advocated by this array of reformers, he claims, is a "rationalized, formalized, codified practice set entirely within the scope—albeit in a subordinate place—of the professionalization projects of the legal field."<sup>9</sup>

Dezalay suggests that the struggle over disputing and dispute processing within the field of law is carried out at the level of institutions and turns on the question of who will control them.<sup>10</sup> For Dezalay, the major question is whose idea of "justice" will organize the practices of dispute resolution within courts and in non-judicial institutions. Moreover, in his view, conflict within the legal field over issues of disputing and dispute processing involves "... a fundamental opposition between theorists, devoted to pure doctrinal construction, and practitioners, limited to applying law to particular disputes . . ."<sup>11</sup> That conflict is characterized by the separateness of legal practice and academic law.

We disagree with Dezalay's understanding of the politics of disputing and dispute processing in three ways. First, contestation has not been limited to the question of who will control institutions and develop institutional practices. It has, in addition, been carried out in struggles over the best ways to *study* and *describe* legal institutions and in efforts to define appropriate relations of persons and legal institutions. Analysis of the politics of disputing and dispute processing must be carried out at both of these levels. Second, contestation has not produced a neat divi-

7. Y. Dezalay, *Negotiated Justice as Renegotiation of the Division of Tasks Within the Legal Field* (June, 1987) (presented to Conference on Dispute Resolution Research in Europe).

8. *Id.* at 7.

9. *Id.* at 24.

10. *Id.*

11. Y. Dezalay, *The Forum Should Fit the Fuss . . . : The Economics of Negotiated Justice 4* (December, 1987) (unpublished manuscript presented to the Amherst Seminar).

sion between legal practitioners and theoreticians. On each level of political combat, the interests of scholars and practitioners in a variety of professions have found common ground. Third, by examining several levels of conflict within the legal field and by asking how the interests of practitioners and scholars are simultaneously at issue in debates about disputing and dispute processing, we can see how arguments about institutional practices depend upon, and arise from, the organization of disciplinary activity with the field of academic legal studies. The struggle within the field of institutional practice is enabled by the outcome of a particular struggle among legal scholars. Finally, we argue that competition within the legal field over the place and organization of dispute processing enables and promotes struggle over the meaning of the juridical subject.

In Part II, we describe the politics of dispute processing at the level of legal institutions. We argue that the contemporary alternative dispute resolution ("ADR") movement is held together by a critique of courts and by a concern for judicial competence and capacity. In addition, we suggest that the ADR movement involves an effort to recast the market for dispute resolution services by different interests attempting to advance their own professional projects. Part III describes conflicts within the legal academy precipitated by the growth of the modern social scientific study of law. It is, in our view, the partial success of that movement within academic legal study that fuels the institutional struggle. Thus, attention must be given to the involvement of social scientists in developing the concept of dispute as an alternative way of thinking about law. In Part IV, we suggest that struggles over the organization of legal institutions and struggles among academics to legitimate the scientific study of law are reflected in debates about the nature of the juridical subject. Those debates are then located in the contemporary critique of rights. Locating those debates in the critique of rights, we suggest that the apparent success of ADR reinforces the social power of law by adding to its repertoire of socially efficacious discursive practices. New vocabularies of control and dependency which, at first, appear to be at odds with rights talk play a parallel social role.

## II. THE INSTITUTIONAL DOMAIN: ADR AND THE CRITIQUE OF COURTS

Dezalay is surely right to suggest that the ADR movement simultaneously transforms and reaffirms institutional life within the legal field and to direct attention to challenges ADR poses to the activities and organization of judicial institutions.<sup>12</sup> ADR is part of a continuing contest over the dominance of courts in the apparatus of state law. It arises from and requires an argument about the capacity of courts to advance different political and professional projects.

The contemporary ADR movement parallels in important ways sim-

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12. Y. Dezalay, *supra* note 7.

ilar disturbances and struggles within law at the turn of the century.<sup>13</sup> In the earlier period, disillusionment with the courts led to the creation of specialized tribunals offering informal procedures for dealing with minor monetary or domestic relations disputes. These tribunals were, however, established within unified court systems and increased the organizational complexity of courts rather than establishing an effective alternative.<sup>14</sup> Although these new courts were responsive to the emerging human sciences, legal professionals retained control, and, as a result, transformations of institutional practice reaffirmed the place of law in society.

The expanded, greatly centralized court system, which grew as a result of the early twentieth century reform movement, itself eventually became an object of criticism for failing to provide responsive and flexible justice. By the 1970s, critics were again advocating systemic alterations, decentralization of the unified courts, and greater "responsiveness to environmental" and community demands.<sup>15</sup> As in the earlier period, reformers also recommended channeling minor disputes into alternatives which would provide participatory and individualized justice.

Contemporary reform efforts have, however, been more than organizational, and have been given a special boost by the "discovery" of, and responses to, a "litigation explosion."<sup>16</sup> Critics of litigiousness claim that reliance upon legal authority is excessive. The responsiveness of courts to demands for redress encourages, in the critics' view, ever more extensive demands and expectations of total justice.<sup>17</sup> Although a "litigation explosion" could be anticipated in a society willing to entrust important decisions to reasoned public argument, critics assert that "the principal thrust of the movement toward a fiduciary social order is the creation of affirmative duties couched in the terminology of ill-defined and often undefined standards."<sup>18</sup> As a result, we create the need for even more litigation, and according to former Chief Justice Warren Burger, "we may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated."<sup>19</sup> A former deputy attorney general of the United States complains that "the legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy."<sup>20</sup> We suffer, in a word, from hyperlexis, too much law.

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13. C. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985); Harrington, *Delegalization Reform Movements: A Historical Analysis*, in 1 *THE POLITICS OF INFORMAL JUSTICE* 35 (1982).

14. Harrington, *supra* note 13, at 58.

15. Hays, *Contemporary Trends in Court Unification*, in *MANAGING THE STATE COURTS* 130 (1977).

16. Galanter, *Reading the Landscape of Disputes*, 31 *UCLA L. REV.* 4 (1983).

17. L. FRIEDMAN, *TOTAL JUSTICE* (1985).

18. J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 29 (1981).

19. *Those #\*X!!!! Lawyers*, *TIME* 56 (April 10, 1987).

20. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, 15 *REG.* 10 (1978).

While some have advocated abandonment of the judicial form,<sup>21</sup> most contemporary criticisms of litigation and adjudication, like earlier ones, combine claims of shared allegiance to principles of legitimacy for example, equality, justice, liberty, with the search for new and improved procedures. Now, as earlier in the twentieth century, reformers have promised to extend the realm of self-government and "real" community.<sup>22</sup>

The success of the reform movement in creating alternatives to adjudication has depended, in large measure, upon the availability of non-judicial models of decision making and dispute resolution which also seem to serve goals of equality, justice, and autonomy. Thus, anthropologists provided examples of successful non-adjudicatory dispute processing from African tribes, the Zapotec indians of Mexico, Scandinavian fisherman, and some Bavarian villages, each of which offers, proponents say, ways of resolving disputes without the imposition of authority or force characteristic of formal adjudicatory processes. Closer to home, historians described American communities—in Dedham, Massachusetts, Oneida, Chinatown—and business associations in which peace, harmony, and mediation have seemed preferable to conflict, victory, and litigation.

Those latter examples have been particularly notable because they suggest that American history is more than the story of "the glorious triumph of law over inferior forms of communitarian extra-legal tyranny."<sup>23</sup> It appears that American allegiance to the rule of law has been accompanied by "a recurrent dialectic, between legality and its alternatives"<sup>24</sup> which results in repeated efforts to create dispute processing mechanisms outside the courts.<sup>25</sup> These mechanisms are supposed to

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21. The turn away from formal legal procedure has also been justified by claims that the extension of legal rights failed to provide substantive justice.

The principal objection to legal formalism advanced at both points in time is that substantive justice ideals invoked on behalf of *legality* in a liberal democracy (equality, justice, and liberty) come into conflict with *legalization* (the extension of procedure rules governing the processing of disputes). Such a view opposes the extension of legal rights on the ground that formal rationality, the necessary basis of legal legitimacy, fails to provide substantive justice. Consequently, the reform movement favors delegitimation . . . . [The] advocates of delegitimation justify their proposals as reconciling, harmonizing, and balancing formal and social justice.

Harrington, *supra* note 13, at 36.

22. Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, in 1 *THE POLITICS OF INFORMAL JUSTICE* 249, 265 (1982).

23. J. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 14 (1983).

24. *Id.*

25. If historical examples of alternatives to law, or justice without procedural formality, encouraged contemporary reformers, some have urged caution to those who would use the historical record to reconstruct—or to transplant—what may be American but are nonetheless culturally alien social arrangements. Auerbach writes:

The . . . indwelling sense of common purpose that turned communities away from litigation to alternatives like mediation and arbitration is likely to fascinate but ultimately distress modern Americans. It is not easy to empathize with our communitarian forebears. They were too involved in each others lives to satisfy our craving for privacy and solitude. They were mutually supportive, but also intrusive and suspicious; they were cooperative, but also coercive. The strength of a

replace the formality of the court with the informality of the neighborhood, principles of law with general considerations of morality and shared responsibility, win or lose outcomes with compromises, and the coercion and authority of the state with social pressures of the group or community.

In addition to examples of community moots, the contemporary ADR movement also draws upon models of non-judicial decision making within labor relations, especially highly developed and sophisticated techniques of mediation and arbitration. As Getman notes, labor arbitration has been "frequently pointed to as the paradigm of private justice,"<sup>26</sup> offering final, guiding, predictable, efficient, neutral, fair dispute resolution. Because labor arbitration is believed to successfully achieve these values, commentators often conclude "that it offer[ed] a technique for dispute resolution that [could] be routinely applied, with only minor adjustments, in other situations."<sup>27</sup> As a consequence, there has been little reticence about transferring this procedure from its historical and organizational context—collective bargaining between labor and management—to other settings. "Speeches by AAA [American Arbitration Association] officials and AAA pamphlets aggressively sell the process as having something to offer in a variety of circumstances."<sup>28</sup> Arbitration has, as a result, been advocated as a means of dispute resolution for consumer disputes,<sup>29</sup> family disputes,<sup>30</sup> medical malpractice,<sup>31</sup> prisoner grievances,<sup>32</sup> shareholder conflicts in close corporations,<sup>33</sup> community

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unified community, after all, implies the ability to compel adherence to its norms, at the expense of contrary individual preferences. The choice of a non-legal alternative to adjudication never was a decision to replace power with love, or coercion with cajoling. It was the application of power to serve the common interest at the expense of competing individual claims. It was, therefore, the exercise of the power of the community on its own behalf. This was possible because the meaning of justice was clear to its members . . . . Precisely that clarity rendered courts and lawyers not only superfluous but even subversive. Only when there is a congruence between individuals and their community, with shared commitment to common values, is there a possibility for justice without law.

*Id.* at 15. See also Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America*, in 2 *THE POLITICS OF INFORMAL JUSTICE* (1982).

Despite such cautions, the contemporary ADR movement draws upon examples of both contemporary and historical communities of common value to support the institutionalization of local, community-based informal justice outside, or more accurately, beside, the law. Despite radically different historical and social contexts, some promoters of informal dispute resolution attempt to turn the tide against modernization and formal rationality and to return control of disruptive, injurious, or offensive behaviors and transactions to communities where they could be managed through mediation, compromise and restriction enforced by social sanctions and disputants' desire to settle. See Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 *STAN. L. REV.* 1 (1973).

26. Getman, *Labor Arbitration and Dispute Resolution*, 88 *YALE L.J.* 916 (1979).

27. *Id.* at 917.

28. *Id.* See also Coulson, *Annual Report: Responding to a Changing World*, 1 *AM. ARB. A. NEWS & VIEWS* 3-6 (1975).

29. Comment, *Non-Traditional Remedies for the Resolution of Consumer Disputes*, 49 *TEMP. L.Q.* 385 (1976).

30. Coulson, *Family Arbitration: An Exercise in Sensitivity*, 3 *FAM. L.Q.* 22 (1969).

31. Nocas, *Arbitration of Medical Malpractice Claims*, 13 *FORUM* 254 (1977).

32. Goldfarb & Singer, *Redressing Prisoner's Grievances*, 39 *GEO. WASH. L. REV.* 175 (1970).



or citizen disputes,<sup>34</sup> government contract disputes,<sup>35</sup> and employment disputes in higher education.<sup>36</sup> In all these situations, the labor experience is used to support proposals for alternatives to adjudication.<sup>37</sup>

Finally, in its critique of adjudication, the contemporary ADR movement drew upon and incorporated Freudian/psychoanalytic critiques of rationalism which have achieved a nearly taken-for-granted status in popular and intellectual discourses.<sup>38</sup> At the most obvious level, the psychoanalytic challenge to rationalism derived from its claims to unmask and explore the irrational foundations of human behavior. Beyond this, Freudian perspectives promoted interpretive and imaginative forms of understanding, rather than objective and positivistic marshaling of material evidence associated with science and with law. Integral to both the new subject of study—the irrational aspects of human behavior—and the new emphasis on interpretation and imagination, was a particular process of communication. Although the forms and techniques of therapy were advanced as both a scientific and a professional activity, its widespread acceptance was founded in shared values associated with personal revelation, personality growth, and development.<sup>39</sup> Moreover, such values energized the so-called helping professions and supplied them an outlook and a world view with which to take on, and combat, the allegedly alienating ideologies of legal practitioners.<sup>40</sup>

Armed with the techniques of psychotherapy and labor mediation and with associated ideologies of empowerment and self-knowledge,

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33. Leffler, *Dispute Settlement Within Close Corporations*, 31 ARB. J. 254 (1976).

34. Note, *Arbitration of Attorney Fee Disputes*, 5 UCLA-ALASKA L. REV. 309 (1976).

35. Hardy & Cargill, *Resolving Federal Contract Disputes*, 34 FED. B. J. 1 (1975).

36. Finkin, *The Arbitration of Faculty Status Disputes in Higher Education*, 30 SW. L.J. 389 (1976).

37. One prominent labor specialist claims that advocates of alternatives to law who draw upon labor practices and arbitration underestimate the importance of context. See Getman, *supra* note 26. Reformers assume that the experience of labor arbitration is universally successful, that its success is attributable to speed and informality, and that it is extractable from the ongoing relationships and organization of collective bargaining.

Moreover, Getman argues that advocates of labor-like alternatives to law are mistaken in their assumption that arbitration is somehow fundamentally different from adjudication or administrative decision making, and he urges caution because "much of the writing describing and evaluating [labor arbitration] has come from practitioners whose professional egos are intertwined with the success of the process." *Id.* at 948. There is a marked tendency by professional associations and practitioners to downplay the critical and to accentuate the importance of the professionalized technique. Getman suggested, very early, a need to attend to the powerful array of interests promoting this "new" reform.

38. P. REIFF, *TRIUMPH OF THE THERAPEUTIC* (1966).

39. At a more abstract and yet critical level the valorization of intersubjective communication and exchange, which is at the heart of the psychoanalytic model, has been given a political boost by the work of Jurgen Habermas, and others in the Frankfurt School, who have been actively seeking both philosophical and political responses to the apparent dilemmas and injustices—crises—within liberalism and modernity. See J. HABERMAS, *LEGITIMATION CRISIS* (1973); J. HABERMAS, *TOWARD A RATIONAL SOCIETY* (1970). See also R. GEUSS, *THE IDEAL OF CRITICAL THEORY* (1981). Although the communicative theories of Habermas are themselves challenges to the Freudian paradigm, they nonetheless validate increased attention to the processes of interpersonal, as well as organizational, communication which are central to the ADR movement.

40. See Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

promoters of ADR have abundant resources upon which to draw in mounting their criticisms of courts and adjudication. Indeed, the history of the ADR movement can be told as a story of a series of entrepreneurs, what Howard Becker has called moral entrepreneurs, "whose initiative and enterprise overcame public apathy and indifference and culminated in the passage of federal legislation,"<sup>41</sup> state legislation, and the appropriation of millions of private foundation dollars for the establishment of ADR programs.<sup>42</sup> Here, ADR proponents have combined demands for substantive justice with technocratic concerns for efficiency, adaptability, and cost effectiveness. Indeed, efficiency and substantive justice claims often seem inseparable in this field. Thus, the ADR movement found a variety of models and antecedents to draw upon, and it developed a range of voices promoting dispute resolution as a way to limit, transform or avoid courts and adjudication.

### *The Teams and the Players*

We can identify three major groups each of which has been, during the last decade, actively struggling to establish non-judicial means of dispute resolution. While we recognize that the supporting arguments of each group are not mutually exclusive, they suggest important differences of emphasis within a broad framework of agreement. Professional and institutional support for ADR comes from all positions along the political spectrum; it has produced, nonetheless, a recognizable, if not fully coherent, political movement. The struggle over the place of judicial institutions, and law itself, in the provision of dispute resolution services has enlisted proponents from inside and outside the legal field and legal scholars as well as practitioners.

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41. H. BECKER, *THE OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 135 (1963).

42. Moral entrepreneurs work to remedy evils which disturb them. They identify a general cause or harm which threatens all and propose specific remedies to alleviate the social problem thus named. Gusfield writes that reform crusades frequently reveal "the approach of a dominant class toward those less favorably situated in the economic social structure." Gusfield, *Social Structure and Moral Reform: A Study of the Women's Christian Temperance Union*, 61 AM. J. SOC. 223 (1955).

Moral crusaders typically want to help those beneath them to achieve a better status. That those beneath them do not always like the means proposed for their salvation is another matter. But this fact—that moral crusades are typically dominated by those in the upper levels of the social structure—means that they add to the power they derive from the legitimacy of their moral position, the power they derive from their superior position in society.

H. BECKER, *supra* note 41, at 149.

The obvious consequence of a successful crusade is the creation of new rules and procedures, and with the establishment of organizations of "rule enforcers" or service providers, the crusade—in the case of dispute, the idea—becomes institutionalized. "What started out as a drive to convince the world of the moral necessity of a new rule finally becomes an organization devoted to the enforcement of the rule." *Id.* at 155. While much of the continuing support for the ADR movement has come from those who want to provide expanded dispute resolution services to persons unable to secure access to legal justice, it is important to note that the movement is not solely devoted to providing services to the less powerful and subordinate classes. Merry, *Disputing Without Culture* (Book Review), 100 HARV. L. REV. 2057 (1987).

### The Establishment Bar and Legal Elites

We begin with the establishment bar and legal elites who have promoted ADR as a way of dealing with the contemporary crisis of the courts. Theirs is not a critique of the essence or ideals of adjudication; instead, they seek to save adjudication by limiting it, to preserve the space of law by not overtaxing its institutional capacity.<sup>43</sup> Elite lawyers want to conserve judicial resources for the resolution of business and commercial disputes and are willing to see other matters removed from courts if not from the legal field itself. This precipitates conflict with lawyers whose share of legal business would be radically diminished by limitations on adjudication and is reflected in the opposition to ADR by groups like the American Trial Lawyers Association.

Yet the elite bar interest in ADR is not simply a practitioner interest. Scholars and theoreticians have taken up the cause. Foremost among academic proponents is Frank Sander. His work has played a critical role in promoting the study of dispute processing in law schools and in mobilizing the legal establishment's support for ADR. His *Varieties of Dispute Processing*<sup>44</sup> helped set the agenda for efforts both inside and outside the law school. In that article, Sander promoted the dispute processing perspective as a way of thinking about judicial administration and legal procedure. He argued that procedure might be improved if scholars treated adjudication as one of many ways of resolving society's disputes. In his view, legal thought was cabined, and the legal profession was threatened, by an unrealistic view of the limits of adjudication. As a result, lawyers were unable to understand why courts were increasingly swamped with litigation and how to "reserve the courts for those activities for which they are best suited."<sup>45</sup> This concern, as much as any other, animated Sander's early efforts and led to the creation of the American Bar Association's Committee on Minor Dispute Resolution.

For the establishment bar, judicial inefficiency endangers judicial and legal legitimacy by preventing courts from responding appropriately and quickly to important matters. In addition, the inability of legal forums to respond to the accumulated grievances of any or all social groups is perceived to be a source of serious latent instability and a general breakdown in law and order.<sup>46</sup> As Representative Kastenmeier, chairman of the House Judicial Subcommittee on Courts, Civil Liberties and the Administration of Justice, put it in a debate concerning federal financial support for alternative dispute resolution:

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43. See COUNCIL ON THE ROLE OF COURTS, *THE ROLE OF COURTS IN AMERICAN SOCIETY* (1984).

44. Sander, *supra* note 2.

45. *Id.* More recently Sander has produced an extended treatment of the dispute processing perspective in the form of a law school textbook. See S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985). That text pulls together and organizes a wide range of material on the disputing process, but it is more than an ordinary collection. It is animated by, and develops, a distinctive perspective on the role of courts and of non-judicial mechanisms for processing disputes.

46. These themes are explored in SMALL CLAIMS STUDY GROUP, *LITTLE INJUSTICES* (1972).

The federal government is not interested in silencing a particular barking dog or solving a given family squabble; it is interested in assuring that forums exist at the State and local level to resolve these disputes so that State and local governments may preserve public order, promote harmony among citizens and guarantee access to legal justice.<sup>47</sup>

The American Bar Association ("ABA") has also taken a leading role in this effort because the development of responsive dispute resolution mechanisms is thought to contribute to legal legitimacy. The ABA sponsored the 1976 Pound Conference on Popular Dissatisfaction with the Administration of Justice which launched a national campaign to experiment with mediation and arbitration. Following the recommendations of the Pound Conference, the United States Department of Justice created the Office for Improvements in the Administration of Justice (OIAJ) one of whose tasks was to develop support for informal dispute resolution. Several offices of the Justice Department (National Institute of Law Enforcement and Criminal Justice as well as OIAJ) collaborated with local sponsors in the development of experimental neighborhood justice centers following national guidelines established with the help of the ABA. These pilot programs, and legislative efforts to expand and institutionalize them, drew support from the highest ranks of legal establishment including former Chief Justice Warren Burger, Attorney General Griffin Bell, as well as a host of local legal elites.<sup>48</sup>

At the same time, however, these efforts generated opposition from inside and outside the legal community. Supporters of legal services for the poor opposed the federal government's involvement with ADR as an effort to undermine government legal services programs.<sup>49</sup> Moreover, the alliance between the ABA and the Department of Justice encouraged opposition from organized consumer groups who had been working for nearly a decade to establish a national consumer protection agency and other formal processes specifically designed to redress consumer grievances. They criticized the neighborhood justice center experiments as

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47. COMMITTEE ON THE JUDICIARY, DISPUTE RESOLUTION ACT REPORT, H.R. DOC. NO. 492H.2, 96th Cong. 1st Sess. (1979). See also C. HARRINGTON, *supra* note 13, at 101 (for an analysis of the political interests and groups who lobbied for and against federal legislation creating federally sponsored and funded ADR programs).

48. From 1977-1980, House and Senate committees held hearings on an act to institutionalize ADR. Among those testifying in favor of the legislation were Daniel Meador, Assistant U.S. Attorney General; John Cratsley, Acting Presiding Justice of Salem District Court, Commonwealth of Massachusetts; Talbot D'Alemberte, Chairman, and Professor Frank Sander, Harvard Law School, representing the ABA Special Committee on Resolution of Minor Disputes; Samuel E. Zoll, Chief Justice of District Court Department, Trial Court, Commonwealth of Massachusetts; Jeffrey L. Perlman representing the U.S. Chamber of Commerce; Lee Richardson, Acting Director U.S. Office of Consumer Affairs; as well as representatives from the OIAJ, the Better Business Bureau, and the National Home Improvement Association.

49. See Sarat, *Informalism, Delegalization and the Future of the American Legal Profession*, 35 STAN. L. REV. 1217 (1983); C. Harrington, *supra* note 13, at 78. According to Harrington, Ralph Nader's Public Citizen Litigation Group only reluctantly supported some aspects of the neighborhood justice concept. The Director of the Legal Services Corporation, Thomas Erlich, was also reluctant to join a coalition of the ABA and the Department of Justice. C. HARRINGTON, *supra* note 13.

likely to evolve, like small claims courts, into collection agencies for business rather than effective forums for redressing failed market transactions. Opponents of ADR favored expanded opportunities and resources for the legal protection of a wide range of commercial, public, and private rights rather than wholesale delegization through the creation of informal dispute resolution.

For legal elites, maintenance and protection of the legal field and the capacity of courts to protect already existing rights required active resistance to such expansionist demands. Maintaining legal legitimacy and judicial capacity required, in their view, a coordinated effort at rationalization in which asking less of courts was an essential first step. The technique of "fitting the forum to the fuss" and of devising alternatives to courts like Neighborhood Justice Centers<sup>50</sup> was part of an effort to develop rational mechanisms for allocating and channeling disputes into appropriate processes. Elite practitioners and academics sought to create a generalized engineering capacity for managing legal and social issues. They looked to ADR as a strategy of incremental adjustment, not radical transformation,<sup>51</sup> and, in so doing, they focused on the question of how disputes and dispute processing techniques could be matched up, of how an understanding of different forms of dispute processing could "be utilized so that some criteria can be devised for allocating various types of disputes to different dispute resolution processes."<sup>52</sup>

Here they have frequently drawn on the work of Lon Fuller.<sup>53</sup> In a series of well known papers, Fuller identified characteristics that differentiate various dispute resolution processes from other modes of social ordering.<sup>54</sup> In each work, he sought to abstract from history and con-

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50. Rosenberg, *Let the Tribunal Fit the Case—Establishing Criteria for Channeling Matters into Dispute Resolution Mechanisms*, 80 F.R.D. 147, 166 (1977).

51. Sander, *supra* note 2.

52. *Id.* at 26. Those who imagine this kind of rational allocation of society's dispute resolution business employ, or would employ, several standards for making allocative decisions. Although they may not state it exactly in this fashion, their approach suggests the following standards for channeling disputes: (A) *The magnitude of the rights at issue.* Disputes involving questions of fundamental or basic rights belong in a formal judicial process. Other disputes, which do not raise such issues, can be dealt with informally. (B) *Complexity.* The standard of complexity seems to be offered to justify both formal and informal processes. Thus some argue that technical complexity, for example in complex economic litigation, should be accompanied by formality; mirroring arguments that supported the establishment of small claims courts, promoters of informalism suggest that the simpler the dispute, the more appropriate informal treatment. However, some promoters of informalism suggest that very complex issues, such as those in some tort or environmental litigation or regulatory rule-making, are better handled and should be considered through informal negotiating fora. (C) *Finality.* Court judgments, so the argument goes, fail to resolve disputes where the real cause of the dispute cannot be captured in or by the legal cause of action. This is often the case in disputes arising out of ongoing personal relations. In such cases, informal dispute processing seems more appropriate. (D) *Cost.* Informalism is said to be less expensive. Disputes should be processed by the least costly alternative so long as that alternative is able to meet other salient allocation standards. See Sarat, *The Role of the Courts and the Logic of Court Reform*, 64 JUDICATURE 300, 305 (1981).

53. See COUNCIL ON THE ROLE OF COURTS, *supra* note 43; Sander, *supra* note 2.

54. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1979) [hereinafter Fuller, *Adjudication*]; Fuller, *Mediation, Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 1.

text, to see beyond variations in local practices and to define the essential form of adjudication, negotiation or mediation.<sup>55</sup> Like Fuller, Sander<sup>56</sup> suggests that dispute processing techniques can be classified into discrete and separate clusters, for example, negotiation, mediation, and adjudication, by identifying the essential attributes of the techniques in each cluster.<sup>57</sup> In this work, the contexts and various forms of dispute processing practice are given less attention than the effort to achieve definitional purity.

Proponents of ADR use the essential attributes of each technique or institution to deduce an understanding of its distinctive capacities and limits, an understanding of what kinds of disputes different forms of dispute processing are best equipped to handle.<sup>58</sup> Fixed characteristics appear, in this argument, to impose fixed limits such that disputes appropriate for one dispute processing technique may be inappropriate for another.<sup>59</sup> As one example, Sander argues that disputes should be channelled to and matched with, appropriate dispute processing techniques. He assumes that the nature and characteristics of disputes and disputing processing mechanisms are sufficiently stable so that each dispute can be assigned to an appropriate process. In their discussion of adjudication Sander and his co-authors announce that "our goal is to understand better what tasks courts are particularly well suited to perform and what tasks they are less well suited to perform."<sup>60</sup> Institu-

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55. Fuller writes that his goal is to "define 'true adjudication' or adjudication as it might be if the ideals that support it were fully realized." Fuller, *Adjudication*, *supra* note 54, at 357. While there have been other attempts to define essential characteristics of dispute processing techniques, Fuller's was, and remains, the most influential. See, e.g., M. SHAPIRO, *COURTS* (1981).

56. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 45; Sander, *supra* note 2.

57. For other similar attempts, see D. HOROWITZ, *COURTS AND SOCIAL POLICY* (1977); J. MARKS, E. JOHNSON & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA* (1984); Cappelletti & Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective*, in 1 *ACCESS TO JUSTICE* 3 (1978); Eckhoff, *The Mediator, The Judge and the Administrator in Conflict Resolution*, 10 *ACTA SOCIOLOGICA* 148, 158 (1967).

58. See also D. HOROWITZ, *supra* note 57.

59. Sander's advocacy of dispute resolution is based on his belief that given the right match of dispute and dispute processing technique, harmony can be restored, problems can be dealt with so as to produce resolutions that satisfy the disputants and are therefore likely to be final. Sander, *supra* note 2. Thus, *Dispute Resolution* talks about dispute resolution rather than dispute processing, suggesting closure and completion of the dispute. See also J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 57; Rosenberg, *Civil Justice Research and Civil Justice Reform*, 15 *LAW & SOC. REV.* 473 (1980-81). This emphasis on resolution suggests an image of social life in which harmony prevails, in which conflicts are idiosyncratic and in which mediation, arbitration, adjudication and other dispute processing techniques work to put an end to such conflict. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 45. See Rosenberg, *supra*.

60. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 45, at 150. Sander's advocacy of a dispute processing approach emerges from and is continuous with one major effort to reconstitute and reconstruct legal thought in the aftermath of legal realism. Compare B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984); Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1152 (1985). It is, from this perspective, an extension of the so called "legal process" approach to an apparently more disputatious world. H. Hart & A. Sacks, *The Legal Process* (1958) (unpublished materials). See also Brest, *The Substance of Process*, 42 *OHIO ST. L.J.* 131 (1981); Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (1982); Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the 70s*, 57 *TEX. L. REV.* 1307 (1979). For a

tional capacity problems are in this view largely problems of institutional overload.<sup>61</sup> In this way, the critique of adjudication becomes a defense of adjudication.

### Access to Justice Proponents

Another part of the contemporary ADR movement begins with a very different critique of adjudication. It focuses on the costs and delays associated with adjudication and, in particular, on its resulting inaccessibility. For these proponents ADR is a means to increase access to justice. The access to justice group is generally thought of as progressive and motivated by a desire to help the socially disadvantaged.<sup>62</sup> Yet from within the legal field, practitioners and scholars turned to ADR as a half century earlier others had looked to small claims and juvenile courts to increase their market share of legal work. Calls for increased access to justice have long been associated with the professional interests of marginal practitioners and those who seek to bring the poor and dispossessed within the network of legality.

Following on the heels of the civil rights movement and the extension of the new legal rights to blacks, members of ethnic and religious minorities, women, the aged, and the handicapped, increased access to justice professed to address the needs of a broad constituency.<sup>63</sup> The phrase itself, "access to justice," is a rhetorical symbol of undeniable attractiveness and mobilizing power.<sup>64</sup> Beyond its symbolic import however, the phrase, and the political/legal movement it named, incorporated an ambivalent attitude toward, and a systemic contradiction within, liberal legalism. To increase access to justice means changing the structure and procedures of adjudication; yet, at the same time such demands reaffirm faith in law and in legal procedure, and in the justice they provide.<sup>65</sup>

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more complete treatment see Sarat, *The New Formalism in Disputing and Dispute Proceeding*, 21 *LAW & SOC'Y REV.* 695 (1988).

61. Edwards, *Commentary. Alternative Dispute Resolution: Panacea or Anathema?* 99 *HARV. L. REV.* 668, 669 (1986).

62. *E.g.*, J. CARLIN, J. HOWARD & S. MESSINGER, *CIVIL JUSTICE AND THE POOR: ISSUES FOR SOCIOLOGICAL RESEARCH* (1967).

63. Although much legal policy and research treats persons with these status attributes as if they were socially and materially—ontologically—distinct, it is important to remind ourselves that we do not experience ourselves simply as a member of a racial, ethnic, religious, or gender category without also experiencing that status modified by one's other characteristics. Despite the too common notion that rights have been extended on the basis of particular, and favored, statuses, no one is, for example, black without also having a religious, class, and gender identity. For an extended discussion criticizing the contrary notion, that there are essential social characteristics or roles experienced unmediated or modified by other aspects of identity, see E. SPELLMAN, *THE INESSENTIAL WOMAN* (1988).

64. See Sarat, *Access to Justice*, in *LAW AND THE SOCIAL SCIENCES* (1987).

65. Friedman explains, however, that access to justice becomes a noticeable social problem when liberal legalism, with its insistence that law be both general and equal in its application, becomes widespread, as it seemed to be in the civil rights movement of the 1950s and 60s. Friedman, *Access to Justice: Social and Historical Context*, in 2 *ACCESS TO JUSTICE* (1978). Indeed, the liberal desire to equalize social relationships, or at least to ensure that the legal order treat all citizens equally, has typically provided the energy behind the "access to justice" movement.

Because legal systems habitually recognize a broader range of legal rights than they are capable of vindicating,<sup>66</sup> there is always a "huge latent demand" for adjudication that calls for "rethinking of the system of supply—the judicial system."<sup>67</sup> Rights, it is argued, are meaningless without effective institutional mechanisms for their vindication.<sup>68</sup> This argument presupposes<sup>69</sup> that the political and legal order actually intends legal rights to have significant instrumental value.<sup>70</sup> Legal rights are, in this view, created to alter political relationships, and to redress basic social inequities; if they fail to do so—to change the distribution of social resources—the failure must be one of implementation, not intention. Thus, the problem is a problem of institutions and institutional design. To increase access to justice means expanding dispute processing mechanisms in order to decide questions of right that would otherwise not be addressed.

Reformers have tried to increase access to justice by expanding legal representation and improving adjudicative procedures to accommodate different types of litigants and issues.<sup>71</sup> Reformers also seek, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms.<sup>72</sup>

They want to encourage the creation of new dispute processing institutions and procedures, and they imagine the judicial system supplemented, though not supplanted, by a number of different forums to which citizens might bring their disputes. The defining characteristic of these forums would be their informality,<sup>73</sup> speed, and low cost which

66. Friedman, *The Idea of Right as a Social and Legal Concept*, 27 J. Soc. Issues 189 (1971). Cf. Silbey & Bittner, *The Availability of Law*, 4 LAW & POL'Y Q. 399 (1982).

67. Cappelletti & Garth, *supra* note 57, at 51.

68. Cf. O. HOLMES, *THE COMMON LAW* (1881).

69. E.g., *ACCESS TO JUSTICE* (M. Cappelletti ed. 1978).

70. For a criticism of such a view, see S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

71. Access to justice reforms have occurred in what Cappelletti and Garth describe as three distinct "waves." The first wave began in the early 1960s and provided for the extension of legal aid to the poor through state subsidized and privately funded legal services. In this wave, incorporating the poor within the legal field required the legal profession to compromise one of the central tenets of its ideology—independence from the state. Since, by definition, the poor could not provide a market for legal services the state substituted for the market mechanism. As in other areas, professional self-interest overcame professional ideology.

The second wave focused upon the representation of diffuse or collective interests, especially, although not exclusively, the interests of consumers and environmentalists. The vindication of many public, collective, or diffuse rights seemed to require the relaxation of standing rules, provisions for class actions, as well as activist judiciary. Cf. Orren, *Standing to Sue: Interest Group Conflicts in the Federal Courts*, 70 AM. POL. SCI. REV. 723 (1978). This wave promoted the adaptation of adjudication to changes in both the substance and volume of demands newly voiced through expanded legal representation. The third wave incorporates the first two, but goes beyond the traditional concern with legal representation and procedure that is basic to both. Cappelletti & Garth, *supra* note 61.

72. Cappelletti & Garth, *supra* note 57, at 52.

73. There has been, of course, extensive discussion in the dispute processing litera-



collectively would mean more access to justice.

### Quality Proponents

A third group of ADR proponents directed their critique of courts to issues of quality not issues of efficiency or access. This group criticized adjudication for its alleged inadequacy in addressing the substance of disputes and relationships between disputants. These advocates envisaged processes that would get at the "underlying" trouble from which disputes emerge, and they proposed dispute resolution techniques that would both restore harmony and empower disputants while responding to personal needs and to detailed understandings of their situations.

Such "ideal" resolutions required dispute processes that were forward looking, constructive and creative rather than processes that narrowed issues to fit the prescribed forms of legal argument.

For the most part, litigation is a way of viewing the past through the eyes of the present. Perhaps justice is best done by starting with the present—with present needs and present demands—and using the past only where it reveals equitable considerations which will provide guidance in shaping a remedy. . . . We are still—in contract law, in domestic law, in landlord-tenant law, in tort law—engaged in a quest for fault, for 'who did what when' as a way of deciding how the risk should be borne and who should pay, perform or provide remedy. Yet, in domestic relations, industrial injuries, automobile accidents, we are finding that the quest for fault is time consuming, elusive and not particularly productive in terms of enabling human beings to get back on their feet and to cope with the present or chart a rational course for the future.<sup>74</sup>

For this third group, ADR is one method of moving dispute resolution procedures away from the alleged adversarial all-or-nothing, blame-or-guilt orientation of courts.<sup>75</sup> Just as centuries earlier, equity sought to reform law by expanding the range of actions and remedies, this group seeks to expand the range of relevant issues to be taken into account when disputes are processed. As a result of their ability to reach

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ture about the distinction between formal and informal dispute processing institutions; indeed, the effort to work through these distinctions spurred the growth of the "disputes" industry. Abel says that: "institutions are informal to the extent that they are non-bureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic." Abel, *Introduction*, in 1 *THE POLITICS OF INFORMAL JUSTICE* 2 (1982). As Abel acknowledges, however, this definition is more a rough sketch of potential traits of informal justice than a precise delineation of exclusive characteristics.

74. Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME L. REV. 927, 932 (1966). The Cahns did not specifically advocate what has come to be known as ADR although they did urge the creation of "community based crisis intervention teams" employing a variety of professional skills. These suggestions, however, fed the call for alternative processes in a variety of institutional settings and social problem areas and were frequently cited in the literature recommending the adoption of ADR.

75. Danzig, *supra* note 25, at 15.

and assess all relevant issues, alternative dispute resolution procedures, it was argued, would resolve disputes by developing a consensus about future conduct rather than by assigning responsibility for events in the past. Freed from formal legal categories and procedures, informal alternatives could get at the heart of problems and actually solve them, rendering true or better justice, contributing to social harmony and stability.

Thus, for example, in place of the conventional models of the criminal process,<sup>76</sup> Griffiths proposed an altogether different conception, what he called the family model of criminal procedure.<sup>77</sup> He began by noting that whatever the variations were in conventional images of the criminal justice system, all formulations relied upon a singular ideology which pitted the individual against the community in a battle for the detection, apprehension, prosecution and punishment of offenders.<sup>78</sup> He wanted to radically alter the ideology of criminal adjudication—promoting reconciliation, resolution, and adjustment of differences within an environment of harmony and love. Others followed Griffiths with very concrete proposals for restructuring the courts, if not to reproduce the ideological premises of the family, then to incorporate a broader range of procedures and to achieve substantively better results.<sup>79</sup>

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76. These models are described by H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

77. Griffiths, *Ideology in Criminal Procedure, or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1971). It should be noted that unlike many of the supporters of ADR and others whose work was used to promote the institutionalization of ADR, Griffiths was more tentative. He writes:

I should nevertheless induce the doubter to suspend disbelief, at least temporarily, by making the proposed alternative ideology as plausible as possible. So I propose to gather some respectability by using an allusive name for it: a name, that is, that invokes a "real world" institution which occasionally inflicts punishments on offenders for their offenses but which is nonetheless built upon a fundamental assumption of harmony of interest and love—and as to which no one finds it odd, or even particularly noteworthy, that this is the case. I will, then (following Packer in using the word "model" only for convenience sake, and preferring to think of it as an ideological metaphor) offer a "Family Model" of the criminal process. I wish to emphasize, however, that this allusive reference is to our family ideology as I take it to be, not to the facts of all or particular families.

*Id.* at 372.

78. Griffiths notes that punishment goes on in other settings, especially families, and there punishment is neither conceived of nor executed as a battle of antagonistic interests. "A parent and child have far more to do with each other than obedience, deterrence and punishment, and any process between them will reflect the full range of their relationship and the concerns growing out of it." *Id.* at 373. If criminal courts functioned as families in adjudicating offenses and meting out punishment, Griffiths argued, we would be required to reconceptualize both the crime and the criminal from anti-social acts and persons demanding exclusion to a recognition of the variability of social behavior and the ultimate reconcilability and interconnectedness of the offender, the offense and the community. Offenses would be acknowledged to be what they are—regular not extraordinary occurrences, just as punishment is not an isolated phenomenon but part of a continuing relationship between child and parent.

These changes in the conception of offenses and offenders would also entail changes in the attitude toward, and of, public officials in the legal system. Rather than removed and disinterested, the family model presupposes a close, dependent, and caring relationship between officials and suspects, as well as fundamentally altered procedures for responding to troubles, crimes and disputes. Griffiths, *supra* note 77.

79. Danzig, for example, recommended the creation of community moots to handle

Supporters of ADR argued that adjudication frequently fails in cases involving persons with ongoing relationships and that this failure could be responded to in a new system which built upon those relationships.

A moot might handle family disputes, some marital issues . . . juvenile delinquency, landlord-tenant relations, small torts and breaches of contract involving only community members and misdemeanors affecting only community members. The present system does not, after all, perform the job of adjudication in most of these cases. Civil proceedings are generally avoided because the parties are too ignorant, fearful, or impoverished to turn to small claims courts, legal aid, or similar institutions. Many matters which may technically be criminal violations will not be prosecuted because they are viewed by the prosecuting attorney as private and trivial matters. The criminal adjudicative model seems particularly insufficient and a system of conciliation correspondingly well advised when we know that due to institutional overcrowding and established patterns of sentencing the vast majority of misdemeanants and some felons are not likely to be imprisoned. For these defendants, the judicial process is not a screen filtering those who are innocent from those who will be directed to the corrective parts of the process. Rather, it is the corrective process; as such it fails to be more than a "Bleak House," profoundly alienating, rather than integrating.<sup>80</sup>

Courts, it was argued, subjected the delicacy of interdependent and ongoing relationships to a very considerable degree of overkill. As Simon Rifkind puts it, the object of judicial intervention in disputes is to bring them "to an end by determining whether the plaintiff or the defendant prevailed."<sup>81</sup> The judge is obligated to declare who was or was not guilty or at fault for what actions, and the judicial decision must state whether the claim originally asserted in the lawsuit was or was not valid. Such clarity about blame can be unfortunate in relationships involving trust, spontaneity, and reciprocity. Here, it was argued, adjudication has the tendency to disrupt further rather than to heal.<sup>82</sup>

Because, for the third group of ADR entrepreneurs, the problems

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local disputes and disturbances, and Fisher called for the establishment of community courts to adjudicate minor criminal offenses. Danzig, *supra* note 25; Comment, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 AM. U.L. REV. 1253 (1975). Adopting a therapeutic approach, in contrast to the traditional adversarial justice concern with responsibility and just dessert, they urged that local courts be supplemented by dispute resolution processes that emphasized integrative and conciliatory outcomes.

80. Danzig, *supra* note 25, at 44.

81. Rifkind, *supra* note 2, at 101.

82. The dynamics of interpersonal relations require a mutual acceptance of responsibility as a face-saving way out of conflict. Social practice has it that apologies should be met either with a polite acceptance or with a professed, if not sincere, sharing of guilt. See Wagatsuma & Rossett, *The Implications of Apology*, 20 LAW & SOC'Y REV. 461 (1986). Branding one party to a dispute as blameworthy makes reintegration and resumption of previous relationships difficult. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Cf. Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623. This is especially so when the label is applied authoritatively and pub-

of courts were to be found in their inability to resolve disputes fully and finally, increasing court and law enforcement capacities would not solve the problems plaguing the courts. Those problems were attributed to the distant, bureaucratic and authoritative character of courts. To remedy these structural failings, those who advocated community moots relied on emotional bonds and community networks joining judge and disputants rather than upon social distance and hierarchy; they encouraged wide ranging discussion "so that all tensions and viewpoints psychologically—if not legally—relevant to the issue were expressed."<sup>83</sup> Rather than emphasizing the trappings of formal authority and coercive power, moots would operate in familiar surroundings of the home and the community and employ everyday logic, norms and manner.

This critique of courts was advanced simultaneously by those trying to break out of the legal field and develop a strategy for community empowerment, and by those trying to extend the precinct of legal control by softening its allegedly rough edges. Groups like the American Friends Service Committee ("AFSC"), a private nonprofit Quaker organization, were active in the critique of adjudication described above and in promoting what they called community dispute resolution. They hoped that "community mediation centers [would] provide an avenue to strengthen and empower local communities by decentralizing social control functions and providing community residents with an enhanced sense of their ability to handle legal and political problems on their own."<sup>84</sup> The AFSC created the Grassroots Citizen Dispute Resolution Clearinghouse which served as a resource center for community groups seeking to organize citizen dispute resolution ("CDR") programs.<sup>85</sup>

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licly, and when the adjudication of guilt or blame, juxtaposed with an original denial of responsibility, may be construed as an official finding that the denial was a lie.

The substance of a dispute, however, includes more than the relationship between the parties; it refers to facts in dispute, to issues and questions and details of the problematic events or relationships. Therefore, some of those who advocated reform because it would provide substantively better justice were concerned less with disputes between persons in ongoing relationships than with disputes where the issues were complex, technical, and apparently beyond the expertise of judges. Two kinds of litigation in particular seemed to raise calls for different forms of dispute resolution: 1) cases in which the issues were scientific or so technical that the litigation became a matter of debate between experts, and beyond the generalist expertise of many judges, and 2) cases in which the issues were so broad as well as complex that they were likely to confound any single attempt at amelioration. See Cavanagh & Sarat, *Thinking About Courts: Toward And Beyond A Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371 (1980).

83. Danzig, *supra* note 25, at 43.

84. Merry, *supra* note 25, at 17.

85. Although it closed within a decade for lack of funding, the CDR Clearinghouse was, during its lifetime, a national advocate for grass roots programs, that is, programs of informal dispute resolution unattached to courts, police, or prosecutorial offices. The Community Dispute Settlement Service of the Friends Suburban Project in Delaware County, Pennsylvania, just outside of Philadelphia, and the Community Association for Mediation in Pittsburgh were prominent examples of CDR, the former middle class dominated and the latter an effort to build CDR "directly into the fabric of a black neighborhood." Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in 1 THE POLITICS OF INFORMAL JUSTICE 75, 93 (1982). The San Francisco Community Board Program, established in 1978, is another example of the promotion of informal justice as a way to strengthen neighborhoods and communities.

AFSC did not view dispute resolution as an alternative to existing processes or institutions. It was for them a constituent part of community life. The neighborhood and volunteer orientation of dispute resolution programs was, in their view, essential. "From the Clearinghouse's perspective the importance of dispute resolution is not just in providing another nicely packaged court service, but is in the potential for restoring to neighborhoods the responsibility of taking a major role in problem solving. Neighborhood responsibility is the key."<sup>86</sup>

This focus upon community empowerment meant that CDR programs would not easily fit with court-sponsored ADR. In fact, CDR programs would not operate where the coercive power of the state was part of the dispute situation and therefore would not accept referrals of disputes that had already been filed in courts. Moreover, court-annexed dispute resolution programs were rejected because they were organized in tandem with the institutional structure of the court system, often on a city-wide or county-wide pattern, and thus did not mesh with neighborhoods. Finally, the state-sponsored programs did not easily accommodate staffing on a part-time or totally volunteer basis as the community groups required.<sup>87</sup> CDR thus represented a direct and frontal challenge to programs and experiments, for example, neighborhood justice centers,<sup>88</sup> favored by the elite bar and its theoreticians. CDR appeared to threaten the legal profession's ability to control new developments in dispute processing and to contain them within the domain of their expertise and authority.

By the mid-1980s, the hopes of those who had joined the critique of adjudication from the community empowerment perspective had largely been dashed. The CDR Clearinghouse was closed and many community-based programs were either abandoned or taken over by courts or

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86. Letter from Paul Wahrhaftig to W. Philip McLaurin, Director, Urban Crime Prevention Program, Office of Domestic and Anti-Poverty Operations, ACTION, Washington D.C. (1979) (on file with the authors). The Clearinghouse published a quarterly, *The Mooter*, which devoted its Summer, 1979, issue to the role of volunteers in CDR.

87. Because the community empowerment focus was somewhat at odds with proliferating state ADR programs, much of the Clearinghouse's energy went into monitoring and critiquing such efforts. Wahrhaftig described the dual role of the AFSC as a resource for, and critic of, dispute resolution programs. See Wahrhaftig, *supra* note 86. The AFSC attempted to provide information and resources to funding recipients so that they had current information from experienced sources on community organizing, while also attempting to monitor the experience of government sponsored programs. "We will critique and analyze the problems and pitfalls that are inherent in the structure of the programs or arise under it. We hope that by focusing attention on problem areas as soon as they arise we may be able to help groups avoid pitfalls initially or at least avoid repetition."

88. There was some discussion as to whether the Neighborhood Justice Center ("NJC") established by the Justice Department in Venice, California was a "grass roots" effort. Although the three experimental centers were sometimes presented as three alternative models (Kansas City NJC was viewed as an extension of the criminal justice system, Venice California as a grass roots program, and Atlanta as a hybrid—location in the community but with strong court sponsorship) Wahrhaftig wonders "whether Venice might more properly be called a strawman." See Wahrhaftig, *supra* note 85, at 88. Attorney General Griffin Bell, whose strong support was instrumental in the creation of the NJCs, regarded their creation as an effort to increase access to and reduce the costs of justice. The Venice NJC was an hierarchical organization, monitored and evaluated on the basis of its contribution and relationship to the criminal justice system.

other state agencies.<sup>89</sup> The result within the ADR movement has been increased professionalization.<sup>90</sup> ADR is now firmly within the domain of the legal field and has been effectively made to service the professional projects of practicing lawyers.<sup>91</sup>

ADR extends the reach of the legal field, even as it is based on a critique of adjudication, through a set of complex strategies. Non-adjudicatory alternatives diminish the visible coercion and "violence" associated with the judicial process.<sup>92</sup> Because coercion is less extreme and less visible in these informal institutions, the reach of control can be wider, less resistance is generated, and even "trivial" problems can be subject to regulation.<sup>93</sup> Moreover, because informal processes appear to be less expensive—at least to begin with—they permit intervention, in one form or another, in a larger number of cases. The quantity of resources for state social control is increased by relieving formal legal institutions of some demands while nonetheless maintaining the overall capacity of those institutions.<sup>94</sup> Because informal processes do not require violations of law to initiate action, and do not stigmatize participants—who are respondents and complainants not defendants and victims—intervention can be earlier, covering a wider array of behaviors and attitudes, unconstrained by jurisdictional boundaries or legal categories.<sup>95</sup> Coercion is replaced by persuasion, threat, manipulation, but power and authority is exercised nonetheless.<sup>96</sup> Finally, ADR expands

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89. R. HOFRICHTER, *NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY* 98 (1987).

90. One need only note the growth of such organizations as the Society of Professionals in Dispute Resolution and the growth of private, for-profit providers of dispute resolution services. The promise of increased efficiency and lower costs which were associated with ADR have been used by economic entrepreneurs to market ADR for private concerns (for example businesses, insurance companies) that are regular users of court services. They argue that just as privatization promises cost/effect, market sensitive action in the regulatory or administrative arena, private justice would produce similar benefits for users of the court system. See generally Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 134 (1974).

Mini-trials and rent-a-judge programs as well as mediation and arbitration services were promoted by for-profit concerns like ENDISPUTE. Businesses were prepared to buy the product and support ADR in these areas because they perceived themselves as all too often victimized by public justice and runaway juries. The result has been the creation of a two track world of ADR—the lower world of publicly-supported programs for minor criminal, neighborhood, and family disputes; the upper world of privately marketed dispute resolution services for business disputes. Merry, *supra* note 42, at 2067.

91. Y. Dezalay, *supra* note 7; R. HOFRICHTER, *supra* note 89.

92. Cover, *Violence and the Word*, 95 YALE L.J. (1986).

93. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 270-71 (1982).

94. *Id.*

95. R. HOFRICHTER, *supra* note 89; Abel, *supra* note 93, at 272.

96. S. Silbey & S. Merry, *Interpretive Process in Mediation and Courts* (1986) (unpublished manuscript). The notion that power disappears in the absence of hierarchy seems fundamental among ADR promoters. If the direct, legally sanctioned ability to exercise or command the exercise of coercion, force, or confiscation of property is lacking, observers too often assume that power in its other forms is also absent or, if not missing, is somehow shared. See generally M. FOUCAULT, *POWER/KNOWLEDGE* (1980); S. LUKES, *POWER: A RADICAL VIEW* (1974); D. WRONG, *POWER: ITS FORMS, BASES AND USES* (1979). The attention to greater participation by disputants in the processes of dispute resolution suggests to some observers that the outcomes are therefore shaped by the parties. This argument, however, ignores the possibility that the parties may be participating in the legitimization of their own

the legal field by coopting or undermining mechanisms of dispute processing in traditional social institutions and by bringing them within the preview of law and the legal profession.<sup>97</sup>

### III. THE DISCIPLINARY DOMAIN: SOCIAL SCIENCE AND LEGAL THOUGHT

The ADR movement and its critique of adjudication also emerges out of the efforts of social scientists to find a place for themselves in the production of academic legal scholarship. The issue here is whether legal study can be made scientifically respectable, empirically rigorous and theoretical<sup>98</sup> or whether legitimate legal scholarship is irreducibly normative. Like the contemporary critique of institutions which has fueled the ADR movement, the modern struggle for scientifically-sound scholarship about law replays earlier struggles within the legal academy which were precipitated by the effort of legal realists to advance an instrumentalist conception of law and to ground legal policy in empirical observation.<sup>99</sup>

Realists saw the start of the twentieth century as a period of knowledge explosion and knowledge transformation.<sup>100</sup> Some saw in both the natural and emerging social sciences the triumph of rationality over tradition, inquiry over faith, and the human mind over its environ-

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subjugation or control. See S. Silbey, *On the Relationship Between State Theory and Sociological Research* (1988) (paper presented at the 1988 Annual Meeting Law and Society Association, Vail, Colorado); S. Silbey & S. Merry, *supra*.

97. Abel, *supra* note 93. This is ironic, Abel suggests, because some impetus for the creation of alternatives derives from a nostalgia for traditional authority. See *Joint Hearings on Resolution of Minor Disputes. Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary and Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. (1979) (statement of Daniel J. Meador); Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 8 BRIT. J.L. & SOC'Y 141 (1981). Cf. Silbey, *Who Speaks for the Consumer?* (Book Review), 1985 AM. B. FOUND. RES. J. 429. Traditional institutions do not simply wither away but are, Abel claims, actively destroyed by the growth of state, state-supported institutions and professions. Cf. C. LASCH, *HAVEN IN A HEARTLESS WORLD* (1977). The institutionalization of ADR furthers the state's monopoly of social control by mobilizing additional mechanisms and processes of social regulation and further expropriating the conflicts and troubles of citizens. Paradoxically the appropriation of conflict takes place within processes which attempt to narrow the interactions, number of participants and public/justice considerations within any disputes, thus both neutralizing and privatizing conflict. Christie, *Conflicts as Property* 17 BRIT. J. CRIMINOLOGY 1 (1977). Cf. Silbey, *The Consequences of Responsive Regulation*, in REGULATION ENFORCEMENT (1984).

Although this analysis suggests that the expansion of state power increases oppression, it is important to remember, as Joel Handler has reminded us, that traditional institutions are not necessarily havens of freedom and solicitude, nor are they models of equality and neutrality. Recourse to law is often undertaken to get out from under the oppression of personalistic, idiosyncratic decision making.

98. See D. BLACK, *THE BEHAVIOR OF LAW* (1976).

99. Legal realism was by no means, however, a unified or singular intellectual movement. At one and the same time, the label "legal realist" embraced radical skeptics and those who exhibited strong faith in science and technique. See A. HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* (1978); L. KALMAN, *LEGAL REALISM AT YALE 1927-1960* (1986); Cohen *Transcendental Nonsense and the Functional Approach*, 35 CALIF. L. REV. 1152 (1985); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Peller, *supra* note 60.

100. Reisman, *Law and Social Science: A Report on Michael and Eschler's Casebook on Criminal Law and Administration* (Book Review), 50 YALE L.J. 636 (1941).

ment.<sup>101</sup> They took, as one of their many projects, the task of opening law to this explosion and transformation. Moreover, some realists argued that the law's rationality and efficacy were ultimately dependent upon an alliance with science.<sup>102</sup> By using the questions and methods of science to assess the consequences of legal decisions, realists claimed that an understanding of what law *could* do would help in establishing what law *should* do.<sup>103</sup> Thus, realism initiated a dialogue between law and social science by staking a claim for the importance of phenomenon beyond legal categories and by attacking the self-centered arrogance of legal decision makers.<sup>104</sup>

While realists fought, fifty years ago, to transform legal scholarship by bringing social science into the legal academy, in the contemporary period the effort to further develop and legitimate the social scientific bases of legal scholarship has been associated with attempts to advance the concept of dispute as a way of talking about law. In search of methods that would be scientific, that is independent of the subjects and contexts of study, anthropologists began, in the 1950s, to elaborate the concept of dispute as a way of understanding the role of law in society.<sup>105</sup> Motivated by intellectual dilemmas specific to their discipline, and by a desire to bring law within their professional study, these social scientists tried to reconstitute the subject matter of law by transforming talk about law into talk about disputes.

At first, they defined disputes as public assertions, usually through some standard procedures, of what are initially dyadic disagreements.<sup>106</sup> They argued that the use of this concept offers a way of developing neutral and objective tools of inquiry while overcoming static dichotomies that had characterized anthropological studies of law. Traditionally, anthropological studies had alternately focused upon either particular legal institutions or upon particular legal ideas and conceptions.<sup>107</sup> By focusing upon cases and disputes, researchers tried to get beyond the abstracted categories of institutional or ideational analyses and to attend

101. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827 (1941).

102. See Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFFALO L. REV. 195 (1980).

103. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931).

104. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, (1921); Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940); Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923). By pointing to the scientific impulse in realism, however, we do not want to suggest that there was only one model of empirical social science available for adoption just as we do not want to suggest that there was only one thread of realist practice. The social scientific styles within realism included a wide range of institutionalists as well as very quantitative behavioralists. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973).

105. The following discussion begins from an analysis of the concept of dispute presented in Merry & Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 15 (1984).

106. See Gulliver, *Dispute Settlement Without Courts*, in *LAW IN CULTURE AND SOCIETY* 14 (1969).

107. Moore, *Law and Anthropology*, in *BIENNIAL REVIEW OF ANTHROPOLOGY* (1969), reprinted in S. MOORE, *LAW AS PROCESS* 214 (1978).



to the social action which constituted legal forms—ideas and institutions. The effort was to find ways of studying law that could be truly scientific, free of socio-cultural and legal/doctrinal categories. This effort was, thus, part of a struggle for control of legal scholarship itself. In this sense their use of the concept of dispute was both an effort to legitimate social scientists' activities in the field of legal scholarship and was part of a debate within the discipline of anthropology itself.

By viewing disputes as a sequence of events, noting changes over time, anthropologists began to describe social processes dynamically. The suggested shift in the unit of analysis also promised to overcome the dichotomy in anthropology between law as prescription and law as reflection of social conditions. It did so by treating law as a "manipulable, value-laden language" available for any number of purposes.<sup>108</sup>

Attention to disputes emerged as part of a more general resistance to the structural functional paradigm which had dominated anthropological research, and which had been used to describe relationships among social processes and institutions, such as law and society. Structural functionalism was criticized for its ahistorical quality, and its reliance upon a consensual vision of social order which viewed conflict as a matter of failed conformity with unproblematic normative standards. Thus, during the 1950s and 1960s, research in the anthropology of law,

however diverse in other respects, shared certain characteristics. [The studies] were mainly ahistorical, ethnographic descriptions, based on inductive empiricism and using some form of case method. All concerned a single ethnic group that was deemed to be relatively homogeneous and capable of being isolated, as a "society," for purposes of analysis. Most relied, explicitly or implicitly, on Western conceptions of law, and they considered disputes as the main index of law or its primary locus. Though conducted during the colonial period, they abstracted, by and large, from the processes of colonial domination and from the profound economic and social changes occurring during that period. They were generally functionalist in orientation and concerned with the maintenance of social order. Except for the studies by Malinowski and Gulliver, they considered law primarily as a framework rather than as a process.<sup>109</sup>

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108. S. MOORE, *LAW AS PROCESS* 225 (1978). Cf. Silbey & Bittner, *supra* note 66.

109. Snyder, *supra* note 97, at 143. The dominance of this paradigm was reflected in particular in the work of Radcliffe-Brown who used the term "function" to refer to "the interconnections between social structure and the process of social life," and the term "social structure" to refer to the raw material of social life, to what might be called "social relations" and the patterns of those relations. A. RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 12 (1952). Radcliffe-Brown used the term "structural form" to denote the abstracted and sociologically constructed models of societies which Levi-Strauss called "social structure." See C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (1963); *THE SOCIAL ANTHROPOLOGY OF RADCLIFFE-BROWN* (A. Kuper ed. 1977). Radcliffe-Brown insisted, however, that the social structures he was describing were directly observable phenomena and not abstracted models.

The starting point was a set of living human beings involved in a series of social relationships with one another. This "social network," as he sometimes de-

Radcliffe-Brown, for example, regarded social structures as observable phenomenon which possessed a dynamic quality yet nonetheless displayed, like human beings, significant continuity over times. In structural functionalism, however, attention to continuity was joined to a concern for conformity so that the stability—equilibrium or disequilibrium—of a society could be measured by the amount of deviance in that society. "Where there is marked divergence," he wrote, "between the ideal or expected behavior and the actual conduct of many individuals, this is an indication of disequilibrium."<sup>110</sup> From this perspective, conflict among members of a group about the rules of behavior, or methods for formulating those rules, signify a deeper social instability. For Radcliffe-Brown the goal of structural functional analysis was, in the end, to determine how institutions, like law, maintained the equilibrium and wholeness of a society.

Within anthropology itself, some scholars claimed that this way of talking about law simply replicated the political biases of traditional legal scholarship. They looked for ways scholarship could explain, and promote, social transformation. Some looked for alternative concepts and methods for describing the place of law in that process and, in so doing, emphasized the importance of situations of trouble or cases of hitch, to use the phrase Llewellyn and Hoebel coined in *The Cheyenne Way*.<sup>111</sup> Trouble cases, or disputes, provided an opportunity, in this view, to link the study of norms and institutions with the study of change and evolution.

In a widely referenced survey of the literature, Laura Nader took up the cause and actively championed the concept of dispute as a way for social scientists to study law.<sup>112</sup> In order to place legal processes more directly within social contexts, while simultaneously achieving more reliable empirical and explanatory generalizations, Nader urged anthropologists to use the concept of dispute and make efforts at describing disputing behavior.<sup>113</sup> She argued that an analysis of disputes and responses to disputing was essential for understanding processes of social

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scribed it, and as it would be termed today, he called the "social structure." But behind the flux of everyday interactions, regularities could be established. The regular forms could thus be abstracted. Together these constituted the "structural form" of the society. This again was empirically real, since it corresponded to the stated norms and customary usages of various kinds of social relationships. Being real in this sense, the structural form could be functionally related to the actual processes of social life. In the paradigmatic case, recurrent social activities maintain the structural form, and are in turn determined by it.

THE SOCIAL ANTHROPOLOGY OF RADCLIFFE-BROWN 29 (A. Kuper ed. 1977).

Although he asserted that social structure was dynamic, "like that of the organic structure of a living body," *Id.*, Radcliffe-Brown emphasized the continuity of social structure through time. He argued that like biological organisms society experiences constant renewal and change. Nevertheless, he believed that the "general structural forms . . . remain relatively constant," and he insisted that "even in the most revolutionary changes some continuity of structure is maintained." *Id.*

110. A. RADCLIFFE-BROWN, *SYSTEMS OF KINSHIP AND MARRIAGE*, reprinted in *THE SOCIAL ANTHROPOLOGY OF RADCLIFFE-BROWN* 197 (A. Kuper ed. 1977).

111. K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941).

112. Nader, *The Anthropological Study of Law*, 67 *AM. ANTHROPOLOGIST* 3, 23 (1965).

113. *Id.*

control, but equally important for sophisticated and contextual analyses of law and courts, should they exist in a society. From this perspective, disputes are windows on society, openings in the social fabric, moments of exploration in which the collectivity is challenged, transformed, or repaired. Observing disputing processes within their social location, social scientists would witness discussion, reenactment or transformation of norms along with active competition among various interpretations of norms.<sup>114</sup>

Adopting the concept of "dispute," scholars moved from the analysis of law as a system of rules to the study of law as a process of handling trouble cases. With this move, however, formal definitions of law become unnecessary, theoretically pointless and sterile.<sup>115</sup> Emphasis was placed on the continuity of law and other social institutions and processes<sup>116</sup> rather than on the distinctiveness of law. Here, the realist

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114. As Llewellyn and Hoebel suggest in describing the virtues of this lens—the trouble case or dispute:

It is . . . the felt "norms" for conduct, whether or not derived from practice, which are likely to be injected into the case of breach. Per contra, it is the case of hitch or trouble that dramatizes a 'norm' or a conflict of 'norms' which may have been latent. It forces conscious attention; it forces the defining of issues. It colors the issues, too, as they are shaped, with the personalities which are in conflict, and with matters of "face," and with other flavors of the culture. It forces solution, which may be creation. It forces solution in a fashion to be remembered, perhaps in clear, ringing words. It is one more experiment toward new and clearer or more rigorous patterning both of behavior and of recognizable "norm" into that peculiarly legal something one may call a "recognized imperative."

K. LLEWELLYN & E. HOEBEL, *supra* note 111, at 21.

115. See S. ROBERTS, *ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY* (1979); Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC'Y REV.* 217 (1973); Snyder, *supra* note 97.

116. This move paralleled a more general shift within anthropology to a more voluntaristic, actor-centered mode of analysis. The description of societies came to focus more on actors' strategies and choices rather than rules of behavior. In order to escape the notion of society exclusively patterned by norms and rules, anthropologists followed sociologists of the social constructivist perspective and moved toward an analysis of actors operating through and by means of rules, yet constructing those rules and social orders on the basis of choices and strategies. See, e.g., P. BERGER & T. LUCHMAN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966); E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959). The individual was conceived as free to exercise choice within the constraints imposed by her culture and social structure, while simultaneously constructing that context through her actions and interactions. Study of disputes fit nicely here. Scholars could examine the choices which those involved in a dispute made as to the appropriate ways to handle disputes as well as the processes of giving meaning to those disputes in different dispute processing arenas. See Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes; Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1980-81); Mather & Yngvesson, *Language, Audience and the Transformation of Dispute*, 15 *LAW & SOC'Y REV.* 775 (1980-81); Nader, *Styles of Court Procedure: To Make the Balance*, in *LAW IN CULTURE AND SOCIETY* (1969). See also B. Yngvesson, *Public Nuisance, Private Crime: The Clerk, the Court and the Construction of Order in a New England Town* (1987) (unpublished manuscript); S. Silbey & S. Merry, *supra* note 96; Sarat & Felstiner, *The Legal Construction of Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *LAW & SOC'Y REV.* 737 (1988).

Snyder describes the intellectual movement as follows:

[I]ts approach shifts the main enquiry from social organization to processes and also from groups to networks of individuals. It emphasizes the action of parties in disputes just as much as those of negotiators or adjudicators, hence it aims to map the perceptions of individual disputants and gives special attention to the cultural meanings and rationalizations of social action.

Snyder, *supra* note 133, at 145. Other scholars have also discussed the greater emphasis

tradition in legal scholarship legitimated the use of disputes as a way of studying law in action, and thus enabled social scientists outside law schools to claim an important place in the legal field.

The move to study law through the lens of trouble and disputes was part of a move to connect the discipline of legal study to more general developments in the human sciences. Within the human sciences, efforts were being made to cross restrictive disciplinary boundaries. There was active theoretical interest in the functions of a large variety of social institutions and concerted efforts to identify common variables and frames of reference. While anthropologists were adapting or resisting the structural functional paradigm, there were similar adaptations, challenges and echoes in the other social sciences, and continuing efforts to build links across the disciplines. The anthropological formulation of social action and disputing as choice-making strategies bore a close similarity to rational choice models in economics and political science, and it suggested some convergence with role analysis in sociology and psychology. It thus fit well with the desire to move in the direction of a unified social science with fundamental and common units of analysis. "Dispute" looked like it might be one of these essential elements and organizing concepts of social life. The notion of dispute and dispute processing fit well with a behavioral—rather than normative or legal—conception that could be used in a wide variety of situations. It did not carry with it connotations of cultural or institutional bias that were present in many early anthropological analyses that began with a model of law predicated on Anglo-American experience.<sup>117</sup>

In one sense, the development of the concept of dispute as a primary focus of social science research on law can be read as the culmination of a particular moment in the history of ideas in which the model of

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on processes, transactions and individual choices. See *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (L. Nader & H. Todd eds. 1978); *POLITICAL ANTHROPOLOGY* (M. Swartz, V. Turner & A. Tuden eds. 1966); Barth, *Models of Social Organization*, in *ROYAL ANTHROPOLOGICAL INSTITUTE OF GREAT BRITAIN AND IRELAND* (1963) (Occasional Paper 23); Nader & Yngvesson, *On Studying the Ethnology of Law and Its Consequences*, in *HANDBOOK OF SOCIAL AND CULTURAL ANTHROPOLOGY* 884 (1973); Van Velsen, *The Extended Case Method and Situational Analysis*, in *THE CRAFT OF ANTHROPOLOGY* (A. Epstein ed 1967).

117. S. MOORE, *supra* note 108, at 214. Van Velsen argued that faulty comparisons persisted in anthropological treatments of African legal systems, because anthropologists, with or without legal training, operated with "imperfect understanding of their own legal system, with which, explicitly or implicitly, they tend to compare African legal systems." Ethnocentrism seems to have been, in this argument, exacerbated by naivete, leading to very common myths concerning both Anglo-American and African law. Van Velsen describes these as the myth of informality of African law, and the formality, limitation by rules and procedures in Anglo-American courts. He also describes a second myth which asserts that African tribunals seek reconciliation while Anglo-American courts are preoccupied by other concerns which do not address considerations of social organization and composition. Van Velsen suggests that the myths derive from insufficient attention to the "lower" courts in Britain and the United States which are more likely parallels to the African tribunals under examination; he also questions whether scholars have actually determined that reconciliation is the outcome of the African processes. Van Velsen, *Procedural Informality, Reconciliation and False Comparisons*, in *IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW* 137 (1969). See Abel, *supra* note 115 (for extended argument that focus on dispute processes would provide a less ethnocentric, more culturally valid subject of study than law).

elementary particles and general theory in physical science fueled the dream of a true social science with equally fundamental, objective, and verifiable units of analysis. The dispute was for empirical legal research what "demands and support" would be for political science, what "stimulus and response" would be for behavioral psychology, what "utility" would be for neo-classical economics: a new paradigm that would advance the science of law.<sup>118</sup> Dispute became the prism for observing courts and their settings as well as other institutions for interpreting and responding to conflict. For socio-legal scholars, the way to study law was to carve out and construct from social reality "a particular social relationship called the dispute."<sup>119</sup>

The Civil Litigation Research Project, funded by the United States Department of Justice in 1978, was perhaps the largest and most ambitious attempt to use the concept of dispute to organize empirical work on law. Its ambition directed attention to the limitations as well as the possibilities of using "disputes as a link between law and society."<sup>120</sup> What started out as no more than "a general set of orientations"<sup>121</sup> had crystallized into a major perspective and direction for research. The result was to generate and encourage revisionism, criticism and questions about the status and adequacy of the dispute perspective in scholarship about law.

Questions about the utility of the dispute perspective in legal scholarship occurred first within the social science community and reflected narrow struggles for hegemony among legal scholars outside law schools. Some anthropologists argued that the focus on trouble and the management of trouble distracts attention from the far more general pattern of acquiescence and normative integration in social life.<sup>122</sup> They worried that the dispute perspective condemned social science to studying the tip of the iceberg and, as a result, limited the claim of social science knowledge within the legal field.

Engel argued that the legal culture of a community involves "patterns of behavior and norms that are recognized and respected among

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118. Thus Trubek writes that, it seemed desirable to find a way to identify and describe conflicts which did not reach the courts, as well as to compare the performance of courts with that of other possible arrangements for resolving conflicts and protecting rights. These tasks called for a common unit of analysis, some way to compare the controversies in courts and other institutions; it was also necessary to identify potential judicial 'business' that never reached the courts. The answer to these problems was found in the dispute, and the idea of dispute processing.

The dispute was conceived of as the common denominator uniting events outside our institutional machinery with those handled both by courts and by other forms of third-party dispute processing mechanisms. If similar disputes could be identified in court and in other settings, and if the impact of different institutions on such disputes and disputants were measured, the dispute focus would answer the need of functional analysis and institutional comparison.

Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y REV. 485 (1981).

119. *Id.* at 498.

120. *Id.* at 494.

121. *Id.*

122. See Engel, *Legal Pluralism in an American Community: Perspectives on Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425.

particular groups in a community," and he suggested that the interaction between local "customary law," (that which is ordinarily done in a community and recognized as what ought to be done, what is proper and obligatory) and the formal legal system produces a synthesis which reflects the actual legal life and legal culture of the community.

Conflicts, disputes and breaches of norm may become a part of the analysis [of legal culture] to the extent they show the systems at work or illustrate the limits of such systems or friction between them. Dispute is not the foundation of the analysis, however, nor is it logically even a necessary part of it.<sup>123</sup>

While he acknowledged that no system exists without some breaches and that disputes "always play some part in our broader understanding of the normative order as a whole,"<sup>124</sup> he warned that the focus on the breach directed attention away from the facticity of regular observance.<sup>125</sup>

"It is simply incorrect," Engel argues, "to assume that 'customary law' emerges from social conflict in the same sense that the common law emerges from cases and controversies."<sup>126</sup> The dispute perspective presents social relations as generated and sustained by relatively rare instances of conflict rather than the repetitive patterns of unstressful interaction through which expectations and obligations are created and particular patterns of order maintained. By conceiving of society and custom in the same way that law is conceived, the effort to understand legal culture begins from assumptions which end up denying analytic and theoretical independence to non-legal concepts. Upon a single unit of analysis, the dispute, researchers built an elaborate edifice to carry the burden of producing an accurate understanding of all of legal life. That was, in Engel's view, a burden that the concept could not adequately discharge.

Other socio-legal scholars criticize the dispute perspective for its boundless quality. They worry that that perspective would, if taken to

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123. *Id.* at 432.

124. *Id.*

125. Moreover, in Engel's view, attention to disputes and breaches of social norms leads to the kind of functionalism discussed above, where courts and legal institutions become understood simply as dispute processing and dispute resolving institutions. Such a perspective offers very little insight about the most frequent and perhaps most significant activities of many civil courts which rarely involve actively contested disputes, and which routinely require the court to oversee or legitimate decisions and settlements made elsewhere. Although it is well understood that these decisions and settlements take place within the shadow of the court, a central focus on the dispute processing functions of courts obscures its role in processes in which disputing is minimal. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). "Emphasizing as it does an idealized and misleading image of the adversary process in civil trial courts, dispute analysis tends to relegate the major part of the court's work to residual categories (such as 'routine processing'), which typically receive little, if any, analytic attention." Engel, *supra* note 122, at 435. Furthermore, the focus upon the dispute, and the individual case which is reproduced in the dispute paradigm, ignores the impact of the pattern of court activity for legitimation and for the creation of culture. Lempert, *Grievances and Legitimacy: The Beginnings and End of Dispute Settlement*, 15 LAW & SOC'Y REV. 707 (1980-81).

126. Engel, *supra* note 122, at 436.

its logical extreme, undermine its own scientific aspirations by moving social science research farther and farther away from the institutions of the official law. This criticism reflects a concern that the sociology of law will dissolve or will lose its claim to distinctiveness within the various social science disciplines. The battle of social scientists to achieve status within the legal field may, in this view, be won at the cost of a loss of status within the human sciences. This criticism arises as a worry over the kinds of professional and disciplinary claims that socio-legal scholars can make.

This worry is a reaction to recent developments in which researchers began to push inquiry in the direction of examining the life history and development of disputes. While earlier work took the existence of disputes for granted, more recent research emphasizes the problematic nature of dispute development and urges attention to the process through which unperceived injurious experiences become perceived as injurious, injuries ripen into grievances and claims, and become disputes.<sup>127</sup> This paradigm directs attention to the context and transformation of disputes while it gives much less attention to their resolution. Because the "potential for disputes is infinite" and "the possible sources of disputes . . . innumerable," dispute researchers argue that the "disputes which do arise are only a tiny proportion of those which might develop."<sup>128</sup> Thus, studying dispute transformation required a further broadening of inquiry, just as a generation earlier the study of dispute processing required a broadened inquiry in legal scholarship.

Those who urged attention to the dispute development process also urged a redefinition of the concept of dispute itself. They tried to move away from Gulliver's insistence on the *public* assertion of a dyadic disagreement. Miller and Sarat<sup>129</sup> and others<sup>130</sup> argued that grievances emerged from an "individual's belief that he/she is entitled to a resource which someone else may grant or deny," and that a "dispute exists when a claim based on a grievance is rejected either in whole or in part." From this perspective, Gulliver's definition seems to beg one of the more important questions about disputing: how do conflicts and differences enter a particular public arena, including the legal system?<sup>131</sup>

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127. E.g., Felstiner, Abel & Sarat, *supra* note 116; Mather & Yngvesson, *supra* note 116; Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525 (1980-81). Cf. Emerson & Messinger, *The Micropolitics of Trouble*, 25 *SOC. PROBS.* 121 (1977).

128. Fitzgerald & Dickins, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 *LAW & SOC'Y REV.* 681, 684 (1980-81). In significant ways, this work mirrored earlier work by Emerson and Messinger on the natural history and sociological development of troubles, what they called "the micro-politics of trouble." Emerson & Messinger, *supra* note 127.

129. Miller & Sarat, *supra* note 127, at 527.

130. *CONTENTION AND DISPUTE: ASPECTS OF LAW AND SOCIAL CONTROL IN MELANESIA* (A. Epstein ed. 1974); Starr, *A Pre-Law Stage in Rural Turkish Disputes Negotiations*, in *CROSS-EXAMINATIONS: ESSAYS IN MEMORY OF MAX GLUCKMAN* (P. Gulliver ed. 1978).

131. Lempert, *supra* note 125, at 708, also emphasizes the "normative claim of entitlement" underlying disputes, while Mather and Yngvesson adopt Gulliver's definition, stressing the importance of the audience in the formation and recognition of social relationships and disputes. Mather & Yngvesson, *supra* note 116, at 776. In this view, the

Kidder summarized the disciplinary concern generated by this expanded definition of disputes:

If we called all dyadic difficulties 'disputes,' even those private cases which Gulliver termed disagreements, then we would have to include nearly all of human interaction (within our study). One of sociology's major theoretical traditions tells us that everything social, even reality itself . . . is a product of negotiation, and that all things social should be thought of as a process of bargaining . . . . From this perspective, the most routine experiences become sessions in negotiation. Even humor and joke telling are treated as exercises in bargaining . . . . If we stretch the term 'dispute' to include all dyadic bargaining . . . we would have no way to address the issues of access to justice, alternative dispute mechanisms, or the levels of disputing in society as a social problem. Every instance of human interaction would be a candidate for dispute processing analysis. Disputing would be indistinguishable from all human interaction.<sup>132</sup>

Thus attention to the histories of disputes and especially the genesis of disputes aroused suspicion that the sociology of law would no longer have a subject,<sup>133</sup> and sociologists of law would have no particular or distinctive professional claim.

These criticisms suggest that the debate within legal scholarship and scholarship about law over the status of the concept of dispute is itself a struggle for power within the legal field. The claim that studying disputes helps avoid cultural and institutional biases associated with traditional legal scholarship can be acknowledged only so long as it is recognized that that concept carries its own biases. The search for a concept or method to free social science research on law from the interests and values of the community of observers—to use the concept of dispute as a fundamental social fact—was an illusion and a fantasy.<sup>134</sup>

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conflict between two parties must be asserted publicly, that is, before a third party, for a social relationship to have reached the state of dispute. Cf. Abel, *supra* note 115, at 226-27; THE DISPUTING PROCESS: LAW IN TEN SOCIETIES (L. Nader & H. Todd eds. 1978).

132. Kidder, *The End of the Road? Problems in the Analysis of Disputes*, 15 LAW & SOC'Y REV. 707, 721-22 (1980-81).

133. Fitzgerald and Dickins go further and question whether the study of disputes has particular value for understanding law. According to their critique, because studying disputes commits social scientists to study virtually all social interactions, it makes the dispute itself less useful as a unit of analysis. Fitzgerald & Dickins, *supra* note 128. They wonder whether the subject will become so broad as to be unmanageable, and whether "the context is overwhelming the law." *Id.* at 702. They wonder whether the sociology of law will lose all definition and its claims to professional identity, and to participation in the recognizable universe of scholarship about law.

134. Cain and Kulczar suggest that as the concept of dispute was used in social science research on law it became clear that the aspirations to, and claims of, scientific status for that concept were both deeply political and deeply problematic. They state that "[d]ispute theorizing starts with the dispute, as legal theory starts with the law," and they point out that it begins by asserting the primacy of its object of study rather than posing it as a problem. Because "questions are posed about disputes in society, or in their social context . . . the primary task of the [dispute] theorist is to understand the dispute." Cain & Kulczar, *Thinking Disputes: An Essay on the Origins of the Dispute Industry*, 16 LAW & SOC'Y REV. 375 (1982). But in Cain and Kulczar's view the anticipated understanding of disputes is



Cain and Kulczar suggest that struggle over the concept of dispute was fought on the basis of a distinction between science and ideology.<sup>135</sup> They understand science as public discourse, with objects of study developed from known theories, identified logics, and recognizable research traditions. Subjects which are atheoretical, or make claims to be ahistorical, are, for them, ideological. Without a theory of social action, the significance of the object must be taken for granted and assumed, embedded in unstated suppositions and preferences about what is important, what is worth knowing, and why it is worth studying. The assertion that disputes provide the link between law and society<sup>136</sup> is "ideological" because it disguises, that is, fails to locate or theoretically specify, the sources, status, and implications of the object of study—the dispute. This criticism suggests that claims for the universality and comparability of disputes are themselves products of a particular, historically located and culturally specific notion of science, and a particular historically located and culturally specific struggle among academics within the legal field.<sup>137</sup>

This debate about the relative utility and ideological status of the concept of dispute among legal scholars is closely connected to strug-

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limited precisely because the dispute, as a supposed form of social action, is appropriated without establishing connections to any theory of social action. Dispute scholars have, in this view, failed to specify what constitutes social interaction, so that dispute would be understandable as a subset of the interaction. Thus, the relationship between disputes and other forms or subsets of social action, and aggregated patterns of action in institutions such as law, remains problematic and undefined. *Id.* at 383.

135. *Id.*

136. Trubek, *supra* note 118, at 494.

137. The claim for the universality of disputes is stated succinctly by Roberts: "Disputes, both within groups and between them, are found everywhere in human society." S. ROBERTS, *ORDER AND DISPUTES: AN INTRODUCTION TO LEGAL ANTHROPOLOGY* (1979). *Cf.* C. WITTY, *MEDIATION AND SOCIETY* (1980); *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (L. Nader & H. Todd eds. 1978); Nader, *supra* note 112. It is flawed, again according to Cain and Kulczar, because universality is a presumption, such as when the term is applied to some universal phenomenon for which a common meaning is implied by the application of the label; it cannot then be an empirical discovery. Cain & Kulczar, *supra* note 134. Moreover, empirical use of dispute has tended to apply the label to such a wide range of phenomena that it lacks boundaries and definition, and thus is suspect as a universal observation. The claim that the concept of dispute offers a fundamental unit for comparative social analysis is closely associated with the claim that disputes are universal social phenomena. "If disputes are everywhere in society, at all times and places . . . then it becomes possible (and for other reasons, desirable) to compare the ways in which this phenomenon is dealt with, and to explain any differences that occur." *Id.* at 381.

Furthermore, the criticisms which have challenged particular research methods, or definitions of dispute, as well as the relevance of value judgments and justice claims in the concept, necessarily raise questions which go beyond what Trubek refers to as "narrow" notions of method. Trubek, *supra* note 1, at 740. "The problem is not one of method," he writes, "in the narrow sense of surveys versus observation, but one that reaches to the nature of social research itself . . . . The strategy of defining injuries, grievances, and disputes in ways that avoid the issue of the researcher's values is not, paradoxically, value-free." Methods which attempt objectivity in the sense that they desire to be not only universal and comparative, but also free of the researcher's and the subject's valued preferences, "makes inaccessible to thought those injuries and injustices for which there is no objective referent in existing law, consensus, or the consciousness of affected individuals." Indeed, the researcher can try to access only that which is accessible to both her own consciousness and to the subject's consciousness. Any method will therefore be limited to the terminology, language, and methods recognized in those cultures. *Id.*

gles within the domain of institutions. Advancement of the concept of dispute among academics facilitated the critique of courts as well as the search for alternative dispute resolution mechanisms, yet it also facilitated a defense of the social importance of both courts and their alternatives.<sup>138</sup>

Although the concept of dispute was promoted as a general analytic category, the very earliest formulations of the dispute perspective connected the observation and study of disputes with an implicit recognition of the necessity or desirability of dispute resolution. Thus Nader's call for anthropologists to adopt a focus on disputing for cross cultural description also claimed that dispute settlement was a universal social function.

How people resolve conflicting interests and how they remedy strife situations is a problem with which all societies have to

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138. The concept of dispute facilitates the critique of courts as well as a defense of their social importance, in part, by individuating and depoliticizing social conflict. By adopting dispute, not law, as the major theoretical concept, researchers shifted inquiry from social organization to processes and from groups to individuals. They tried to "map the perceptions of individual disputants, and give special attention to the cultural meanings and rationalizations of social action." Snyder, *supra* note 97, at 145. In this effort to write from the bottom up, researchers concentrated on micro-studies of the management of conflict. Individual perceptions, interpretations, responses and strategies became the focus of research with little attention to systematic outcomes, no less to the structural sources or organization of these individual experiences.

Kidder suggests that by focusing on individual decisions as a way of understanding disputing behavior, scholars also adopted the "strong presumptions of equality, case discreteness, and individualism" prevalent in the anthropological literature. Kidder, *supra* note 132, at 719. In this way, researchers inadvertently replicated the conceptual and institutional biases in the methods of studying law that they were attempting to reform. The conception of individuated grievances and cases interacted with an abstracted vision of the parties and created a radically depoliticized vision of conflict. According to this critique, the concept of "dispute" reproduces a legal ideology rather than subjecting legality and legal ideology to critical inquiry.

In the small scale agricultural and hunter-gatherer societies which anthropologists study, the relative equality of the parties in any particular dispute, in terms of organizational structure (individuals, groups, status), disputing competence and social resources, is taken for granted. These assumptions prove problematic when the model is applied to advanced industrial societies, and although much of the more recent literature on disputing has paid homage to the importance of the relative power of the parties, the concepts "power" and "equality," like the concept of "dispute" itself, are used without a theoretical framework to help identify relevant indicators or aspects of power and social position. Merry, *supra* note 25. Without such a framework, allusions to power and inequality do little to challenge the individualistic assumptions of the dispute paradigm because both the disputant and the dispute are removed from the social fabric which provides definition and meaning for the participants as well as for the observer's analysis of the situation.

According to Cain and Kulczar, the dispute model suggests that "differences in power are capable of being equalized: more money, more knowledge, more organization, even more experience, may be given to the weaker party, and then the difference would disappear." Cain & Kulczar, *supra* note 134, at 380. The problem, according to this criticism, is that qualitative, experiential and cognitive differences between parties are treated quantitatively, as independent dimensions which can be manipulated, either reduced or increased and aggregated to construct equal parties—equivalent social actors. The model suggests that social equality can be reduced to quantitative measures without attention to consciousness, cognition or context. The result is a radical abstraction of social action; stripped of its situated and socially constructed meanings, the model of dispute reduces social action to behavioral phenomenon without the accompanying consciousness of others and interpretation of context which constitutes sociability and social interaction.

deal; and usually they find not one but many ways to handle grievances. In any society . . . there are various remedy agents which may be referred to when a grievance reaches a boiling point, and an understanding of all such agencies is necessary for a comprehensive analysis of social control and for a sophisticated analysis of the court system, should one exist.<sup>139</sup>

Dispute researchers treated disputes as social eruptions that needed to be eliminated, managed and contained. Kidder described this as the "pressure cooker model" in which "dispute processing mechanisms [serve] as relief valves preventing social catastrophe . . . . The functionalist assumption, or pressure cooker model, is that each dispute is a discrete disruption which can be rectified if given appropriate and timely treatment."<sup>140</sup> This bias toward dispute settlement reflects the assumption that a dispute constitutes some imbalance or upset requiring treatment or restoration.<sup>141</sup> From this perspective, the trajectory of disputing is "a settlement in the specific case which permits the group to return to normal."<sup>142</sup> Dispute researchers identified different forms of dispute resolution which would provide channels through which social eruptions might pass, with informal mechanisms of social control in the family and the neighborhood handling everyday conflicts, and more formalized complaint and grievance systems of the market and the legal system managing more serious conflicts not settled informally. The image of a funnel with dispute resolution regulating the flow of social interaction and maintaining the balance of pressure between conflict and conformity became a powerful image in the effort to institutionalize ADR.

Indeed it is the very convergence of the effort to promote a scientific study of law through the concept of dispute and the promotion of dispute resolution as a model for adjudication that precipitated the strongest opposition from within traditional legal scholarship. That reaction and opposition is elaborated by Owen Fiss in *Against Settlement*.<sup>143</sup> There Fiss warns that the dispute perspective and the equation of adjudication with dispute resolution are based on a fundamental misunderstanding of the nature of law as well as of judicial institutions.<sup>144</sup> Fiss argues that proponents of the dispute perspective "act as though courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help. Courts are seen as the institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power."<sup>145</sup> This account, in his view, "trivializes" the purposes of adjudication and the nature of legal procedure.<sup>146</sup> In his view adjudication is not comparable in any important

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139. Nader, *supra* note 112.

140. Kidder, *supra* note 132, at 718-19.

141. Nader, *supra* note 116.

142. Kidder, *supra* note 132, at 719.

143. Fiss, *supra* note 1.

144. *Id.* at 1075.

145. *Id.* at 1082.

146. *Id.* at 1085.

way to other mechanism for resolving disputes. Thus the effort to treat courts as just another dispute processing mechanisms and to develop a scheme for rationally allocating disputes among courts and other institutions makes no sense to Fiss. As he puts it, courts possess "power that has been defined and conferred by public law not by private agreement."<sup>147</sup> As a result, "their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts . . . to interpret those values and to bring reality into accord with them."<sup>148</sup>

The dispute processing perspective is dangerous, in Fiss' view, precisely because it elevates process over substance. It portrays law as just another way of ordering private relations rather than as embodying and articulating public values, values that have determinable meanings. In his view the task of legal scholars should be to help identify those values and meanings and to encourage judges to use them in dealing with matters of public consequence. Legal scholarship is, in this view, a type of moral philosophy for which social scientists, among others, have no claim to competence.<sup>149</sup> Fiss' response to the dispute processing perspective embodies a claim to hegemony within the legal field as well as a claim about the distinctive nature of law. He worries that by embracing the perspective of social scientists, of those who administer courts, or of social workers, traditional legal scholars lose control of the legal product. The opportunity to articulate legal values gives way to an overemphasis on efficiency and technique<sup>150</sup> which diminishes the value of law and, as a result, the distinctiveness and social utility of the legal profession itself. Thus the debate about the place of the dispute processing perspective in legal scholarship is, in this view, a debate about fundamental issues confronting law and lawyers.

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147. *Id.*

148. See Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1 (1986).

149. See Fiss, *supra* note 1, at 1086. Fiss' conception of the challenges facing legal scholarship is, in turn, challenged by some, like Bruce Ackerman who suggests that lawyers should be skilled practitioners of both moral philosophy and social science. B. ACKERMAN, *supra* note 60. See Fiss, *supra* note 148.

150. Fiss opposes the dispute processing perspective because it encourages legal scholars and judges to regard litigated cases as annoyances or administrative inconveniences. For him the legal field is defined by the efforts of legal professionals to make judgments about the content and applicability of values like equal protection and to think about the ways those values are systematically undermined by the practices of political and social institutions. His critique is thus overtly political. As he argues, the proponents of the dispute processing perspective "begin with a certain satisfaction with the status quo . . ." Fiss, *supra* note 1, at 1086. But, Fiss continues, "when one sees injustices that cry out for correction . . . the value of avoidance diminishes and the agony of judgment becomes a necessity. Someone has to confront the betrayals of our deepest ideals and be prepared to turn the world upside down to bring these ideals to fruition." *Id.*

Fiss worries that the dispute processing perspective represents a "capitulation to the condition of mass society." *Id.* at 1075. He believes that lawyers and legal scholars should be skeptical about the attempt to encourage diversion or settlement of cases from courts. In his view, adjudication neither mirrors inequalities in private relations nor translates those inequalities into judicial decisions; mediation, negotiation and other dispute processes, on the other hand, do nothing to counteract inequalities among or between disputants. For another view see Galanter, *supra* note 90. See also D. BLACK, *supra* note 98.

#### IV. RECONSTITUTING THE JURIDICAL SUBJECT: RIGHTS, INTERESTS AND NEEDS

The struggle over the place of ADR in the institutional domain and the competition among legal academics and socio-legal scholars for hegemony within the theoretical domain would, in and of themselves, be enough to command the attention of those trying to assess the significance of disputing and dispute processing within the legal field. However, more is at stake than possible rearrangements in the division of society's dispute resolution labor or in the configuration of disciplinary power within legal scholarship. The combination of such institutional and disciplinary changes makes possible, and is made possible by, a reconstitution of the juridical subject.<sup>151</sup> Thus, Fiss' defense of law<sup>152</sup> is more than a defense of adjudication and of legal scholarship as the explication and critique of public values through legal doctrine; it is even more than a defense of the social authority and professional terrain of lawyers. He defends law and lawyering to promote the idea that the relationship of citizens and legal institutions is, or should be, defined by the idea of rights. He seeks to protect rights against those who would displace them as central juridical ideas. The ADR movement and the social science colonization of legal scholarship participate in, and advances, a critique of rights, a critique which in turn promotes alternative conceptions of the relationship of actors within the legal field.

In American legal theory, the juridical subject has been traditionally conceptualized as a possessor of rights, of entitlements to particular kinds of treatment by the state. The legal field has been considered the province for the vindication of claims of right, for the resolution of disputes between persons or between the collectivity and particular individuals. Moreover, the definition of rights, the articulation of the values protected by rights and the fashioning of remedies to vindicate claims of right has been largely the province of judges and of courts.<sup>153</sup> Although rights claims may be asserted against political authority, they are always advanced through public authority; thus, rights have a clear public aspect in the sense that they imply a willingness to make demands on the state, to use public institutions, or to appeal to collective sentiments for validation of those claims.

Contemporary rights discourse has many voices. For example, Dworkin describes rights as trumps, that is, claims that are not matters of discretion.<sup>154</sup> He describes two models of rights, one a "natural"

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151. Foucault suggests that it is precisely the reconstitution of the subject which necessarily accompanies the development of the human sciences. M. FOUCAULT, *DISCIPLINE AND PUNISH* (1977). The reconstitution of the subject makes possible, as it compels, the development of new institutional arrangements.

152. Fiss, *supra* note 148.

153. J. BRIGHAM, *THE CULT OF THE COURT* (1987); R. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989).

154. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978). In contrast, Michael Perry says that, although *one may not want to, one can dispense* with rights talk because it adds nothing to the discussion of duties, obligations and discretion. He argues that rights talk is derivative

model and the other a "constructive" model of rights. The "natural" model locates rights in an objective moral reality where rights are not created by persons or societies but rather are discovered just as we are said to discover the laws of physics. Rights, in this view, rest upon the notion of universal, perhaps eternal and immutable, principles of social action that constitute our shared human nature. The natural model of rights implies the possibility of a plan of life, a blueprint of general principles, according to which life evolves and is ordered, an underlying structure which is in fact discoverable by human reason. "Moral reasoning or philosophy" according to Dworkin's conception of natural rights, "is a process of reconstructing the fundamental principles by assembling concrete judgments in the right order, as a natural historian reconstructs the shape of the whole animal from the fragments of its bones that he has found."<sup>155</sup> In practical terms, this means that the role of courts and judges is to discover fragments of the natural moral order by acknowledging particular claims of right and establishing their relationship to written laws and policies. In this model, positive law or legislative mandates are entitled to obedience only so long as they record, transcribe, or fit with these general principles of natural right.<sup>156</sup>

The "constructive" model of rights, which Dworkin prefers, is based on a vision of moral principles more like to common law adjudication than the discovery of fundamental general principles of morality. The constructive model "treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory" that must be constructed through human action.<sup>157</sup> In this model, rights are neither pre-existing, to be discovered, nor can they be either true or false representations of some external objective moral reality. Rather, the constructive model of rights assumes that persons, and especially public officials who exercise power over others, have a responsibility to justify their actions, or the judgments on which they act, by demonstrating their place in a coherent and general program of action. The role of the judge is to read past decisions and precedents in light of present demands and to both compose and articulate a general theory. This model of rights and judging "presupposes that articulated consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice."<sup>158</sup>

The constructive model neither denies nor affirms the natural model of rights; instead, it is a claim for reasoned consistency, independent of any argument for the objective standing of these reasoned positions. Yet both the natural and constructive models rest in large

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and thus dispensable. Perry, *Rights-Talk and the "Critique of Rights"*, 62 TEX. L. REV. 1405 (1984).

155. R. DWORKIN, *supra* note 154, at 160.

156. For an extended discussion of natural rights, see L. STRAUSS, *NATURAL RIGHTS AND HISTORY* (1953). See also H. ARKES, *FIRST THINGS* (1986).

157. R. DWORKIN, *supra* note 154, at 160.

158. *Id.* at 162.

part on Dworkin's modest claim for legal justice, that "it is unfair for officials to act except on the basis of a general *public* theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases."<sup>159</sup> Both models establish a special relationship between persons, conceived as rights' claimants, and particular public officials, judges, whose job it is to articulate and protect rights.

Fiss's conception of rights derives from his understanding of the function of adjudication as the process through which we give meaning to public values.<sup>160</sup> He describes legal debate as an effort to specify the content of those values. "Whether in the nineteenth century or twentieth century, torts or criminal law, contract or anti-trust, *McCulloch v. Maryland*, or *Brown v. Board of Education*," the function of adjudication, "has not been to resolve disputes between individuals, but rather to give meaning to our public values."<sup>161</sup> In this conception, rights are legal facilities used to express and specify fundamental values. "A right", Fiss writes, "is a particularized and authoritative declaration of meaning."<sup>162</sup> It can exist without a remedy as a standard of criticizing social practices. Remedies, however, expresses the judge's desire to give tangible, efficacious, and "fullblooded" meaning to constitutional values rather than merely to declare what is right.<sup>163</sup>

Fiss argues that the range of voices that participate in the process of giving meaning to constitutional values and to rights "is as broad as the public itself."<sup>164</sup> Nonetheless, like Dworkin, he also makes a strong argument for the special role of the judiciary in concretizing and harmonizing the public values expressed in the Constitution. He points to the structure of judicial office, and what he sees as constraints upon ideological and personal bias, that enable and encourage judges to be more rather than less objective and to "constantly strive for the true meaning of the constitutional value."<sup>165</sup>

Fiss stresses the judge's obligation to participate in a public dialogue by giving reasons for his decisions as that aspect of the institutional design of the office which makes the judiciary especially appropriate for articulating public values and for protecting rights.<sup>166</sup> The quality of the judicial process, he argues, is an indicator of the judge's authority to speak to public issues and the obligation of others

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159. *Id.* at 163.

160. Fiss, *The Supreme Court 1978 Term. Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

161. *Id.* at 36.

162. *Id.* at 52.

163. *Id.* at 46.

164. *Id.* at 1-2. See J. BRIGHAM, *supra* note 153 (for an extended discussion of how the Supreme Court has come to monopolize discourse on the public values embodied in the Constitution and for an argument that the debate on public values and the Constitution should be a less professional and more public enterprise).

165. Fiss, *supra* note 160, at 13.

166. *Id.* at 14.

to listen. In the end, he believes, the legitimacy of the adjudication depends upon reasoned, independent, and careful attention to the process of articulating rights.

Minow elaborates a conception of rights as dialogical opportunities rather than already articulated values or the construction of judges.<sup>167</sup> She suggests that legal texts, and rights-talk as a common theme in those texts, help "to create communities, to establish shared discourse and to provide contexts for linking past with future, and creativity with tradition."<sup>168</sup> Building upon Dworkin's sense that "law's attitude is constructive," laying "principle over practice to show the best route to a better future, keeping the right faith with the past,"<sup>169</sup> yet rejecting his notion that rights are trumps and Fiss's notion that rights are grounded in particular meanings, Minow sees rights as "the language we use to try to persuade others to let us win this round."<sup>170</sup> She wishes to retain what she sees as the attractive features of rights talk in American culture, its association with notions of equality, freedom, respect for individuals; at the same time, she wants to eschew positivistic notions that assign authoritative or fixed meanings to rights "beyond current human choices."<sup>171</sup>

In this conception, the emphasis is on process with rights "understood as the language of a continuing process rather than the fixed rules" of that process. This imagines a community of interaction focused upon competing claims, a discourse in which decisions signify resting points "from which new claims can be made."<sup>172</sup> Rights, then, are markers which guarantee the opportunity to participate in this discourse. The juridical subject is, however, understood to be neither an already constituted possessor of entitlements nor a supplicant awaiting the articulation or constitution of rights by a judge. The juridical subject is, in Minow's conception, whole but incomplete, connected in an ongoing and shared process of building humane social arrangements. Minow seeks to establish the importance of rights talk while leaving open the shifting content of those rights, noting that what draws the community together is less specific claims than the notice and debate which those claims demand. "The rhetoric of rights," she says, "draws those who use it inside the community, and urges the community to pay attention to the individual claimants." At the same time as rights discourse includes participants within a shared community, it "underscores the power of the established order to respond or withhold response" to those claims.<sup>173</sup> In the end, Minow, like Dworkin, makes a seemingly

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167. Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

168. Minow, *supra* note 167, at 1865.

169. R. DWORKIN, *supra* note 154, at 413.

170. Minow, *supra* note 167, at 1876. "Rights represent articulations—public or private, formal or informal—of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted." *Id.* at 1867.

171. *Id.* at 1877.

172. *Id.* at 1876.

173. *Id.* at 1877.



modest claim for rights, but here the claim is one of participation rather than publicly defensible coherence.

Despite the variation within rights talk, it nonetheless takes place within a terrain which, as Minow suggests, draws the participants together in a community of argument and struggle. The boundaries of that discourse are marked by the consistency, in each of these conceptions, of the association of rights with public moral debate. Each vision emphasizes the collective or public articulation of claims and responses. Variation in these formulations centers on the forms of participation and the relative position and authority of different participants in this discourse. While Dworkin and Fiss stress the role of the judge as the authoritative voice for publicly articulating values and portray the juridical subject in terms of autonomy and individuality (which is paradoxically constituted by judicial authority), Minow emphasizes the shared context and interdependence within a public discourse which is constituted by making claims as well as responding to them.

Rights talk and the conception of the juridical subject which it constitutes is, of course, the object of intense struggle within the legal field. A critique of rights and the juridical subject as a rights holder has been an important part of ADR's critique of adjudication. Some critics suggest that rights talk has gotten out of hand so that instead of functioning as the grounds for shared discourse, rights have become a source of social conflict. The proliferation of rights has been unhealthy, it is argued, because new rights have been recognized in the absence of legitimate authority. These newly created rights, so the argument goes, lack foundation in the Constitution and thus, rather than securing the "blessings" of law, weaken the foundations of all legitimate legal claims. Thus, conservatives suggest that rights consciousness and rights talk undermine the community.

From this perspective, rights are associated with litigiousness and blamed for a variety of social and institutional disorders. Critics of litigiousness in American society argue that we seek legal redress for every injury and, in so doing, allow law to invade hitherto immune areas and drastically raise the costs of professional and business life. Rights discourse is, according to this argument, just a cover for self-interested behavior which threatens to disrupt social equilibrium.<sup>174</sup> Critics argue

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174. Although research on why people sue is scanty, there is some evidence challenging this view. It suggests that plaintiffs litigate to vindicate rights and debate social values rather than to pursue individualistic self-interest. Litigants frequently describe their actions as an attempt at social rehabilitation, claiming that they want to send a message to the government, to their neighbors, or simply to the person who injured them, saying that the offending action was wrong, has to stop, and should be publicly condemned.

[Plaintiffs] say that money is not their prime motivation. On the contrary, they believe it often makes more sense in purely economic terms to settle before going to court. But . . . their grievances have turned into matters of principles. And many plaintiffs say they want to "send a message" to the rest of the country.

Stewart, *Seeking Justice: People Prone to Sue Have Many Reasons and Money is But One*, Wall St. J., May 20, 1986, at 1.

However, many litigants express great reluctance to take action against others whose behavior has injured them because they feel that "minding your own business" is an essen-

that too much of modern social interaction is waged by deploying rights in a game which should be, and in the past has been, played outside the legal field. The ability to overcome normative reluctance to take public action and thus the desire to vindicate rights through litigation is seen as a reflection of the decline of traditional sources of authority, indeed a transformation in the valued currencies of social life.<sup>175</sup>

Critics from the political left suggest that the use of rights in contemporary political environments impedes rather than promotes progressive social forces.<sup>176</sup> They argue that rights are incoherent, contradictory, unstable and indeterminate.<sup>177</sup> This critique suggests that rights are abstract and unstable because small changes in circumstances often "make it difficult to sustain the claim that a right remains implicated."<sup>178</sup> Tushnet, for example, maintains that "rights-talk often conceals a claim that things *ought* to be different within an argument that things *are* as the claimant contends."<sup>179</sup> Every situation or setting opens debate anew as to the merits of particular rights claims; there seems to be little generalizability or transferability beyond particular claims. In addition, this critique suggests that the language of rights is so open and indeterminate that competing interests can use similar language to express opposing positions.

A claim of right, this critique asserts, "falsely converts into an empty abstraction . . . real experiences that we ought to value for their own sake."<sup>180</sup> By describing an aspect of experience in the language of rights, we deny and subvert the complexity, ambiguity, and contradiction of social experience. The juridical subject crystallizes experience, not in an authentic form but as a set of alienating abstractions.<sup>181</sup> More-

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tial ethic in modern urban life. Thus, many grievances are never articulated or acted upon. Miller & Sarat, *supra* note 127. But sometimes the circumstances seem so painful, or so unlikely to change, that plaintiffs overcome the normative reluctance "to go public" with their problems and decide to file suit. Only when talk or avoidance fails do they turn to an outside agency. And when that happens, "the parties no longer wish to settle the dispute by discussion and negotiation. At this point they conceptualize their problem as a principled grievance for which they seek an authoritative and binding solution, not as a conflict of interest in which they have limited and negotiable goals," but as a matter of right and justice. Merry & Silbey, *supra* note 105, at 154.

175. "The father, the priest, the prison warden—they've all suffered a decline in public confidence. But the federal judge has gained in stature. People file lawsuits," according to Lawrence Friedman, "because they have confidence in the legal system." L. FRIEDMAN, *supra* note 17 (quoted in Stewart, *supra* note 174).

176. Tushnet, *An Essay on Rights*, 61 TEX. L. REV. 1363 (1984).

177. See Singer, *The Players and the Cards*, 94 YALE L.J. 997 (1984).

178. Tushnet, *supra* note 176, at 1363.

179. *Id.* at 1371 (emphasis added).

180. *Id.* at 1364.

181. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

Marx described the alienated self as a product of the liberal state's denial to each of us of our species membership, and the institutionalization of an isolating loneliness that is then justified as human nature. The liberal state, he argued, abolished distinctions based upon birth, social rank, education, and occupation when it declared, as it did in the American Declaration of Independence or the French Rights of Man, that all men are created equal. The liberal state assured to each citizen the equal right to participate in the collective sovereignty and denied the relevance of birth, social rank, education and occupation

over, rights talk defines a sphere of allegedly individuated actions without acknowledging the social context which produces and nurtures the individual. Rights constitute the juridical subject by constructing boundaries between persons while denying the arbitrariness and violence of those boundaries. More importantly, rights discourse suggests that painful existential contradictions, the problem of being in but not totally within society, the necessity but abhorrence of others, the reliance upon sociality for meaning at the same time as we are dominated by its power, have been resolved.<sup>182</sup>

The entrance of disputing and dispute processes, as well as the ADR movement, into both the institutional and disciplinary domains of the legal field advances, as well as depends upon, such criticisms of rights. There is a way in which some forms of rights-talk, especially the dialogic concept of rights, as well as some of the critiques of rights, especially those which point to the alienating consequences of rights, seem

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to that participation. However, far from denying the importance of these distinctions, Marx argued, the liberal state presupposed and institutionalized these distinctions by relegating inequalities of birth, social rank, education and occupation to protected status in the realm of civil society, liberalism creates a fundamental schism between man (in civil society) and citizen (in the state) which is naturalized in the conception of universal and fundamental human rights. The liberal state, Marx argued, derived its *raison d'être*—the protection of the fundamental rights of man—by cabining the material inequality of civil society. As a consequence, Marx wrote, the citizen lived in a state organized by a set of “privatized” relationships which it claimed—through the conception of rights—were beyond the state to affect. Rights, in this conception, are the means by which participation is organized but they could not provide fundamental and “real” emancipation; here, rights are creations of the liberal state and the means of alienating the individual from his species consciousness—life in civil society.

Following this tradition, Gabel defines alienation as a “paradoxical form of reciprocity between two beings who desire authentic contact with each other and yet at the same time deny this very desire in the way they act toward one another.” Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1567 (1984). He argues that individuals desire intersubjective recognition—authentic connection—but deny this desire as they confront others across a “forbidding distance.” As a consequence, the individual “withdraws her own self and adopts a false self,” with which she confronts and interacts in the world. Thus we live in a world in which we perpetually feel “at once unconnected to everyone else and yet anxiously committed to the pretense of connection that is manifested in the reciprocity of roles.” *Id.* at 1573. Rights provide a basis for denying this dilemma. They become part of the stories we tell ourselves about how we are collectively constituted, yet remain individuals.

182. Thus, critics assert, rights-talk is fundamentally mystifying. It masks the ambiguity it reproduces, incorporating its partiality in claims of universality. More importantly, it silences opposition by encouraging people to think that so long as rights are protected, and argued about through “non-political” legal processes, that political action aimed at transforming the content of those rights is misplaced and illegitimate. Rights-consciousness mystifies because it is portrayed as the complete and total embodiment of rights as well as the process for validating rights-claims. Thus law supplants the ideals for which it is an incomplete, partial, and distorted substitute. Moreover, rights-talk tends to blind us to social problems for which no rights currently exist and to focus attention on the absence of legal remedies rather than on the organization of social problems. M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 275 (1987). Rights-talk has historically developed a particular tautological formulation in which rights exist only in so far as remedies exist; where there is no remedy, there is no right. Cf. O. HOLMES, *supra* note 68. In the absence of remedy and right, “there is no significant interest to vindicate,” and the “absence of a ready legal solution becomes confused with the absence of a significant social problem; the world appears perfect . . . because our tools for further perfecting it are so dull.” M. KELMAN, *supra*, at 276.

to advance ADR by pointing out the importance of attending to very basic forms of human connection and communication. Thus, one can easily imagine the heady confidence that might develop by throwing off the entire mantle and burden of rights-talk and trying to reconceptualize the nature of the juridical subject. There are indeed moments in the movement for ADR when one can detect this kind of passion for going beyond modest tinkering with new procedures by reimagining the grounds on which persons interact and relate to legal institutions.

There is also a degree to which the ADR movement fails to engage the critique of rights. ADR advances a non-rights based conception of the juridical subject, one that neither the dialogic conception of rights, nor the phenomenological critique of alienation can fully capture. Eschewing rights, ADR proponents deploy the discourse of interests and needs. They reconceptualize the person from a carrier of rights to a subject with needs and problems, and in the process hope to move the legal field from a terrain of authoritative decision making where force is deployed to an arena of distributive bargaining and therapeutic negotiation.

#### *From Rights to Interests*

Disputing and dispute processing, as portrayed in some parts of the ADR movement and by some social scientists, reconceptualize the juridical subject by emphasizing interests and preferences as the grounds on which individuals relate to legal authorities. By moving their focus from rights to a concern with interests, advocates of dispute resolution build on the work of those American legal realists, who having exposed conventional rights-talk as just so much "transcendental nonsense,"<sup>183</sup> tried to build a realistic jurisprudence through closer attention to interests.<sup>184</sup>

Although Llewellyn advocated a move from rights to interests as a move toward realism in law, he recognized that interest as a fundamental category for legal decision making would be no more objective than using rights as a fundamental category. His reasoning was straightforward: At first, legal thinkers believed that the rules of law specified the remedies which law would make available to a litigant. The rules of law were statements governing the specific ways one man might get courts to deal with another man. Later legal writers regarded this as primitive and realized that the remedies made available through law served social,

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183. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 309 (1935).

184. Llewellyn, *supra* note 99. The methodological advice of the realists was to maintain, at all times, a healthy skepticism, a skepticism about the adequacy of legal concepts and received categories for ordering social phenomenon, and about the tendency of categories "to take on the appearance of solidity, reality and inherent value which has no foundation in experience." *Id.* Thus by urging attention to interests, Llewellyn made no claim to remove the fundamental inadequacies and ambiguities clouding conventional legal categories and reasoning; he meant only to promote a form of legal analysis that would invite discovery of those inadequacies.

not merely individual, purposes. In this move, the rules of law articulated protected purposes, claims and values which remedies were meant to realize. The move to rights, however, created fundamental and irreducible ambiguities, some of which we discussed above.

Identifying interests as a basis of law would not, Llewellyn argued, remove such ambiguity. While interests emphasized more strongly the social purposes which rights served, "we do not know what interests are."<sup>185</sup> With the move to interests, he argued, law achieved not greater clarity but a more complete and honest subjectivity. Nonetheless, Llewellyn believed that a focus upon interests would do better than rights in encouraging lawyers and judges to pay homage to law as,

something manmade, something capable of criticism, of change, of reform—and capable of criticism, change and reform not only according to standards found inside the law itself . . . but also according to standards vastly more vital *outside* law itself, in the society law purports both to govern *and to serve*.<sup>186</sup>

Although the attribution of social interest necessarily involved value judgments, Llewellyn claimed that it nonetheless isolated these judgments from the observed phenomenon on which they rested. Attention to interests, he argued, pushed legal inquiry into a more pronounced and self-conscious attention to behavior, empirical data, facts, "the actual doings of judges and the effects of their doings on the data claimed to represent an interest."<sup>187</sup> Interests seemed to more forthrightly demand and empower empirical demonstration and would therefore provide the basis for a more realistic legal science.

The work of Vilhelm Aubert constructed a bridge between the realists' formulation of the role of interests in law and ADR's conception of disputes as conflicts of interests.<sup>188</sup> Aubert, a Norwegian sociologist of law, described two forms of conflict which he characterized as competition and dissensus. The former referred to conflicts of interest that derived from situations of scarcity in which two or more actors desired or valued the same thing. Such conflicts were resolvable, he argued, through the market or through mechanisms which compromised the demands, gains, and losses to each side. Because differences between the parties were not differences of commitment or ethics, but arose instead from competition over scarce resources, they could be resolved by mechanisms which "minimize[d] the likelihood of maximal loss" to each side. Conflicts of interest, he continued, "emphasized the similarity of the contestants, their common needs and aspirations."<sup>189</sup>

In contrast, conflicts of value arose not from competition but from disagreements "concerning the normative status of a social object."<sup>190</sup>

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185. *Id.*

186. *Id.*

187. *Id.*

188. Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 J. CONFLICT RESOLUTION 26 (1963).

189. *Id.* at 29.

190. *Id.*

According to Aubert there was nothing in dissensus that should lead people to attack one another; nonetheless, it is apparent that conflicts of value do often lead to serious and violent aggression.<sup>191</sup> Although he was skeptical that conflicts of value could be resolved or compromised in the ways conflicts of interest could, he suggested that successful conflict resolution might depend upon the "interrelations between the dissensus and the interests of the parties."<sup>192</sup> Furthermore, he suggested that for dissensus and conflicts of value, law and courts would provide the most appropriate mode of conflict resolution.

Aubert's analysis was cautiously framed; he noted that although there was a correspondence between the sources of conflict (interests and values) and mechanisms of conflict resolution (bargaining and law), there was no reason to assume that the source or type of conflict would fully determine the appropriate mechanism. He hypothesized that the invocation of law and judicial conflict resolution would, however, transform conflicts of interest into dissensus and conflicts of value, and suggested that the dyadic relationship between disputing parties became in the legal process a triad with the possibilities of resolution constructed out of the probable alliances between the third party and one of the disputants.<sup>193</sup>

Aubert's analysis laid a theoretical foundation for alternative dispute resolution. He argued that so long as conflicts of interest could be kept uncontaminated by dissensus and normative objectification through law, compromise solutions were possible. Solutions to such conflicts would necessarily involve what he called "a natural adjustment of needs"<sup>194</sup> because no grounds existed for differentiating better or worse, right or wrong, true or false values. Judges, in his view, lacked rational grounding for their normative decisions. Against this background, proponents of ADR have argued that law fails to take account of disputants interests. It necessarily abstracts and objectifies their situations by transforming conflicts of interest into conflicts of value which are, in the end, resolved by raw power rather than reason or truth.<sup>195</sup>

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191. The classic statement of the view that disagreements of value, that is, basic fundamental moral disagreements, cannot be settled by argument was presented by Ayer. A. AYER, *LANGUAGE, TRUTH, AND LOGIC* 51 (1936). Cf. C. STEVENSON, *ETHICS AND LANGUAGE* (1944). The position is sometimes referred to as emotivism, suggesting that value statements are expressions of emotion and disagreement is non-cognitive.

192. Aubert, *supra* note 188, at 30.

193. Aubert wrote:

The clash of interests is now formulated as a disagreement concerning either certain facts in the past or concerning what norms apply to the existing state of affairs or both, in a way which often makes it hard to distinguish clearly between questions of fact and questions of law. *The needs of the parties, their wishes for the future, cease to be relevant to the solution.* Whether the solution harmonizes two contrasting sets of needs and plans for the future is no longer material. *The problem has become objectified in the sense that a solution can be reached by an outsider who knows the rules of evidence and is able to perform logical manipulations within a normative structure.*

*Id.* at 30.

194. *Id.* at 34.

195. Aubert's analysis suggested that successful dispute resolution should respond to the parties' interests and needs, which after all was, from the perspective of legal realism, the real foundation of law, remedies and rights. Moreover, his analysis alluded to the

Aubert's work was published just as anthropological and cross cultural studies of disputing were becoming well known, at a time when social scientists were becoming more actively engaged in legal scholarship, and attention to disputes was becoming prominent in the legal field. Aubert offered an analysis which explained why forms of dispute resolution observed in small scale societies of Africa, central Asia and central America worked as they did. Mediation, negotiation, and other processes of informal dispute resolution based upon compromise and conciliation succeeded, following Aubert's analysis, because they addressed conflicts of interest without transforming them into conflicts of value or institutionalizing responses through formal law.<sup>196</sup>

Over the next two decades Aubert's analysis has become orthodox. Courts are, ADR promoters claim, preoccupied with rights talk, while mediation, negotiation and other forms of alternative dispute resolution encourage disputants to think in terms of interests.<sup>197</sup> Descriptions of the mediation process, guides for practitioners and training manuals for students repeatedly describe mediation as a process designed to eluci-

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possibilities for processes of conflict resolution which might increase opportunities for autonomous decision making while limiting the scope of authoritative social control. Aubert suggested that conflict resolution ought to, by definition, "harmonize two contrasting sets of needs and plans." Modes of resolution which focused upon the conflicts of interest, eschewed concern with normative valuations, judgments of right and wrong, assignment of blame, and pronouncements of innocence would, it followed, be able to compromise differences and address the "needs and interests" of the parties. *Id.*

196. Three years after Aubert's article appeared, Torstein Eckhoff published a paper in which he elaborated the implications of Aubert's analysis, with specific reference to the roles of mediator and judge. *See* Eckhoff, *supra* note 57. Eckhoff began his paper by defining mediation as the process of "influencing the parties to come to an agreement by appealing to their own interests." The mediator, according to Eckhoff, works on in order disputants to give more weight to their common interests or less consideration to their competing interests. Although mediators do not have to promote compromise solutions, Eckhoff suggested mediators would normally do so because it added to their prestige as moderate and reasonable third parties. Eckhoff acknowledged that mediators might use threats of sanction if the parties did not seem anxious or willing to settle and mediators might also mobilize normative rules as a means of urging parties to renounce unreasonable demands. If, however, the parties acknowledged common norms but disagreed as to the particular applicability of a norm, or as to the way in which the norm might be used to resolve the current dispute, then mediation was less likely to succeed. Thus Eckhoff reiterated Aubert's observation, which he also supported by references to anthropological studies of disputing, that disagreements about norms were generally unsuitable for mediation. He also emphasized the fact that both mediators and judges needed to be seen as neutral to be effective in their roles, but nonetheless drew on different sources of authority and prestige and were therefore unlikely to be combined well in one office.

Following Aubert, Eckhoff distinguished the *judgé* from the mediator by associating the judge with the domain of norms rather than interests. As a result he identified several important differences in the two methods of conflict resolution. The mediator is looks forward, explores a variety of possible solutions, is generally adaptable, cooperative and constructive. The judge, on the other hand, looks backward toward events already past, determines or allocates rights and responsibilities, and abandons the contest and the parties once this function was performed. The judge speaks with authority but has less of an investment in resolving disputes. *Id.*

197. Economic analysis of law constitutes the juridical subject in similar terms. Instead of interests, economic analysis speaks in terms of preferences. Disputes are understood to arise as rational utility maximizers; each pursue optimizing strategies. Appropriate resolutions facilitate the movement of resources to their most highly valued use; they ape the free market, and are, as a result, efficient. *See* M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983).

date disputants' interests while developing options to meet those interests. For example, Patton reminds students that the overall goals of mediation remain constant despite variations in practice; those goals are "to help parties separate relationship from substance, to elucidate their interests, and to focus their attention on options that take into account both sides' interests and on independent objective standards for choosing among such options."<sup>198</sup>

Ury, Brett and Goldberg argue that mediation can be understood as an effort to change the frame of dispute resolution from power and rights to interests.<sup>199</sup> They suggest that interest based claims say "I want it,"<sup>200</sup> and thus framing disputes in terms of interests "tends over a series of disputes to generate the highest level of mutual satisfaction with outcomes."<sup>201</sup> This is because wants and interests constitute the real motivation for claims, while rights are merely justifications. "Another way of saying this" they write, "is that focusing on interests deals directly with the problem that led to the dispute in the first place in a way that focusing on rights and power cannot."<sup>202</sup> The juridical subject is thus constituted as a bearer of desires or preferences who is forced, when dealing with judicial institutions, to speak a "foreign language" instead of the more natural language of interests.<sup>203</sup>

In this analysis, disputes arise from conflicts of interest that frustrate the satisfaction of wants and desires. The disputing process can be modeled, following this approach, as a series of "dispute decisions" designed to maximize the free exchange of individuated wants, perceptions and resources.<sup>204</sup> Although it borrows from standard conceptions

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198. B. Patton, A Brief Outline of the Mediation Process 2 (1982) (unpublished manuscript). But see Susskind & Madigan, *New Approaches to Resolving Disputes in the Public Sector*, 9 JUST. SYS. J. 179 (1984).

199. W. Ury, J. Brett & S. Goldberg, *Into the Fray* 2-25 (1987) (unpublished manuscript).

200. *Id.* at 2-3.

201. *Id.* at 2-20.

202. *Id.* at 2-19.

203. Contemporary promoters of ADR try to overcome what Llewellyn thought was the necessary subjectivity in the concept of "interest" by following lines of Aubert's analysis and converting interests into economic commodities which can be measured by objective criteria. See Llewellyn, *supra* note 99. Thus, Fisher and Ury include within their five rules of successful interest-based negotiation the need to separate the people from the problem, to focus on interests and not positions, to invent options for mutual gain, and to insist on objective criteria. Raiffa also urges mediators to help parties seek joint gains as well as "derive responsible reservation prices." Mediators are urged to develop objective standards for discussing the terms of a negotiation, for measuring the interests and demands of the parties, and for assessing compliance with settlements. See H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

204. Trubek, *supra* note 118, at 496-98. Trubek describes the "interdisciplinary" model adopted by the Civil Litigation Project as follows:

Our working theory can be described as a "modified stakes" model of dispute decision-making. We began by focusing on the decisions made by disputants. To explain these choices, we took the economic model, illustrated by Johnson (1980-81) and Gollop-Marquardt (1980-81), as a starting point and assumed that a major determinant of decision-making in a case would be the relationship between what the parties perceived to be at stake and their estimates of the costs of various dispute choices (Posner, 1977). Parties would invest in litigation and other forms of dispute processing as long as the expected gain (or loss reduction) exceeded



of economic markets, this rational-choice model of disputing adds to the usual economic variables factors describing the nature of the relationship between the parties, personal and organizational characteristics, the professional organization of legal resources, and a "series of factors related to the type of dispute itself, including areas of law, legal complexity, forum."<sup>205</sup> At the heart of the dispute decision model is the conception of the dispute as an arena of competitive decision making by rationally calculating individuals motivated by utility maximization.<sup>206</sup> The model predicts that disputants will respond enthusiastically, that is, rationally, when presented with more efficient fora in which to negotiate their interests. Thus when disputants did not turn voluntarily or in large numbers to newly created, supposedly less expensive and more efficient alternatives to the courts,<sup>207</sup> promoters suggested that it must be because the parties lacked sufficient knowledge or were actively discouraged from making informed and rational choices.<sup>208</sup> In this economic/interest model, more information and "freedom" from the pressure of legal institutions and ideology should correct for "irrational" choices.<sup>209</sup> Cost reduction and party satisfaction become the benchmarks of negotiated justice and ADR, objective measures of the ability of various processes to serve disputants' interests.

### *Moving to Needs*

The image of the juridical subject in dispute processing discourse is not fully captured through the language of commodification or the appropriation of economic metaphors. The constitution of the subject in ADR is elaborated further in other descriptions of the purpose of negotiation and dispute processing. Those descriptions focus on needs and, in so doing, portray ADR not as a response to socially located and con-

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the cost. They would prefer the choice that offered the highest ratio of expected return to estimated expenditure. Incorporating non-monetary goals and costs, however, presented significant difficulties.

*Id.* at 498. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Gollop & Marquardt, *A Macroeconomic Model of Household Choice*, 15 *LAW & SOC'Y REV.* 611 (1980-81); Johnson, *Lawyer's Choice*, 15 *LAW & SOC'Y REV.* 567 (1980-81).

205. Trubek, *supra* note 118, at 498-99.

206. See Merry & Silbey, *supra* note 105 (for an extended criticism of the concept of disputing as rational choice decision making).

207. See C. HARRINGTON, *supra* note 13; Harrington, *The Politics of Participation and Non-Participation in Dispute Processes*, 6 *LAW & POL'Y Q.* 203 (1984).

208. See Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 *JUST. SYS. J.* 420 (1982).

209. Although the model of disputing as a form of rational optimizing behavior drew most prominently from models associated with economic transactions, it also built upon game theory and strategic analysis which has been used in a variety of settings including international relations and labor management as well as commercial disputes. See Kidder, *supra* note 132, at 717. Cain and Kulczar comment upon a particular irony, however, in the use of the dispute model by liberal and moderate reformers who "end up with a more economic-determinist interpretation than any contemporary Marxist scholar would adopt." See Cain and Kulczar, *supra* note 134, at 381. Here, "knowledge (ideology) and organization (politics), when reduced to quantitative dimensions which are, furthermore independent of each other, become facets of an equally quantitative dimension called money (economy)." *Id.* at 380.

structed demands but rather to essential human requisites and capacities. One begins to see this movement in discussions of what are called underlying interests.<sup>210</sup> Interests articulated as wants, preferences, or desires, may not fully constitute a disputant's "real" interests, and successful dispute resolution must explore more fundamental, deep-seated matters.

Some proponents of ADR warn that dispute processing should not be exclusively centered upon each party's strategies for optimizing their interests.<sup>211</sup> In place of this limited focus third parties "can more effectively accomplish their goals by focusing on the parties' *actual objectives* and creatively attempting to *satisfy the needs of both parties*."<sup>212</sup> What is called "problem-solving" negotiation tries to explore disputants' needs where "adversarial negotiation" speaks only of articulated interests. Thus, Menkel-Meadow suggests that dispute resolution should be designed to meet what she calls the parties' "total set of 'real' needs . . . in both the short and long term."<sup>213</sup>

While Menkel-Meadow talks about disputants in terms of needs, her understanding of needs remains quite narrow. By needs, she says she means only something other, or more, than a legally justifiable claim.<sup>214</sup>

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210. See W. Ury, J. Brett & S. Goldberg, *supra* note 199.

211. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

212. *Id.* at 758 (emphasis added).

213. *Id.* at 760. Menkel-Meadow offers six additional criteria for successful ADR:

Does the solution promote the relationship the client desires with the other party? Have the parties explored all the possible solutions that might either make each better off or one party better off with no adverse consequences to the other party? Has the solution been achieved at the lowest possible transaction costs relative to the desirability of the result? Is the solution achievable or has it only raised more problems that need to be solved? Are the parties committed to the solution so it can be enforced without regret? Has the solution been achieved in a manner congruent with the client's desire to participate in and affect the negotiation? Is the solution "fair" and "just"? Have the parties considered the legitimacy of each others claims and made any adjustments they feel are humanely or morally indicated?

*Id.* at 760-61. She claims that her criteria, with the exception of the last, are utilitarian; that is, she argues that legal negotiations that meet these standards will produce agreements that are "more satisfactory to the parties, thus enhancing commitment to and enforcement of the agreement." *Id.* at 761.

214. Menkel-Meadow writes: "Problem solving is an orientation to negotiation which focuses on finding solutions to the parties' sets of underlying needs and objectives." She elaborates this by stating: "By 'real' problem or objective I mean that which the client wants to accomplish, not how those needs are translated into legal remedies. In disputes it is often useful to look not only at what the dispute is about," here she seems to mean legally possible or probable remedies, "but what brought the parties into a relationship in the first place." *Id.* at 794 & n. 155.

There is an interesting tension in her analysis which imagines very different grounds for negotiation than those we have conventionally institutionalized through adjudication and negotiation, new grounding in the attention to "total needs, goals and objectives"; at the same time, she seems to worry that she has bitten off too much and retreats by creating a strawperson of conventional legal negotiation. In Menkel-Meadow's analysis, adversarial negotiations use law, legal claims, and arguments, as chips to meet disputants' interests. However, she mistakes the chips that are bartered, for the goals—that is, winning the negotiation—and thus imagines the goal of adversarial negotiation to be the successful staking of a legal claim. It is against this reified version of negotiation that she can offer attention to "needs" as something distinct from legal "interests" while simultaneously de-

Despite the limitations of her analysis, it nonetheless signifies an important movement in dispute processing discourse which reconceptualizes the focus of disputes from conventional legal claims of right, beyond utilitarian demands of interest, to both relational and therapeutic understandings of need. The fundamental premise of this analysis is that disputants share certain essential human needs and that attention to those needs will reveal grounds of interdependence, reciprocity, and compatibility which are masked, if not explicitly denied, in adversarial proceedings.

The analysis of need begins with the assumption that "not all needs will be mutually exclusive."<sup>215</sup> By identifying underlying needs, negotiators, according to Menkel-Meadow, can identify shared purposes that would be collapsed in the specification of legal remedies and, in so doing, open up possibilities for solutions that meet both parties' needs.<sup>216</sup> The notion of a satisfactory resolution is not compromise between antithetical preferences. It requires, instead, penetration to the layer of shared attributes and common needs in which the juridical subject is constituted by allegedly universal and invariant human attributes.

In their effort to create effective problem solving mechanisms rather than adversarial claims adjustment systems, proponents identify particular human needs and capacities which they argue are better met by ADR.

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nying that she is moving beyond more traditional notions of "interest." Thus Menkel-Meadow begins with a narrow reading of the literature on negotiation which explicitly speaks to meeting clients' interests, which she argues means legal interests. Menkel-Meadow then argues that meeting disputants' needs is a way of moving beyond law without stating the terrain to which she is moving— except in a negative way.

215. *Id.* at 795.

216. Menkel-Meadow's premises are justified by reference to Carol Gilligan's work on gender differences in moral reasoning. See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982). Gilligan challenges the necessity and utility of hierarchical and deductive reasoning as a model of problem solving, arguing that it limits the possible solutions and denies the ambiguities, relationships, and attachments which constitute the experience of moral dilemma. She criticizes the way in which dilemmas are traditionally formulated in experiments and public discourse so that right answers demand win or lose solutions. In their place, she urges attention to different ways in which problems can be framed and analyzed to produce shared outcomes. She thus proposes what she considers a feminist conception of moral reasoning, which involves a valorization of relationships, and which demands careful attention to the reciprocal needs which bind the parties or which do not necessarily set them in perfectly opposed positions.

Menkel-Meadow concurs with Gilligan's argument that conventional models of moral reasoning narrow questions and disputes to simplistic bi-polar constructions, ignoring the wider array of contextual frames. In response she identifies five basic categories of need: economic, legal, social (relationships), psychological (feelings, including risk aversion), and ethical or moral (fairness), which more accurately map the terms of social relationships and disputes while expanding the possibilities for types of settlement and satisfaction. She calls for a careful inquiry by attorneys, and by implication, other dispute handlers, concerning the relative weights of these needs, their implications in the short and long run, as well as their manifest or latent status for parties in dispute. She does not, however, provide any suggestions for mediating among competing and incompatible needs but seems to assume that in most cases they can be worked out. She concludes that value differences may persist and keep parties at odds, but insists nonetheless that the attempt to take account of both parties' needs, "regardless of how limited the possible solutions may appear to be [are] far more likely to satisfy the parties and effectuate a more permanent agreement." Menkel-Meadow, *supra* note 211, at 808-09.

For example, both Lincoln<sup>217</sup> and Patton<sup>218</sup> suggest that cooperative styles of dispute resolution and mediation meet people's psychological needs for harmony and peace. Echoing earlier functional theories of disputing, Lincoln says that "most people don't like chaos"<sup>219</sup> and are frustrated by it. Thus, he argues, mediation should begin by engaging disputants in the creation and discovery of ground rules by which to manage the chaos of their dispute situation. "Ventilation" is another necessary part of mediation because it allows the people to air the "few things burning inside them" which they are usually afraid to air because people are generally "afraid to . . . ventilate anger."<sup>220</sup> Others argue that cooperative, problem-solving, alternative dispute resolution mechanisms are more likely to meet human needs for autonomy, integrity and dignity.<sup>221</sup> For these proponents, the development of ADR is part of a rethinking of our entire culture, not only the legal system but the culture of corporations and other institutions in which the social self lives and develops. This argument suggests that our dominant culture and institutions foster orientations and attitudes which work against our real human needs.<sup>222</sup>

New dispute resolution methods promote integrity, it is argued, because they require "enormous personal commitment and commitment to hold one's emotions and ego in check long enough to absorb all sides of a problem."<sup>223</sup> Individuals are invited to accept responsibility for their mistakes, without requiring anyone to suffer for misjudgments and lapses. In contrast to legal procedures which instantiate rights, and traditional negotiations which validate while distributing competitive interests, ADR relies less upon well-defined rules, standards or tactical orchestration developed in those processes, and more explicitly upon the integrity and sense of responsibility of the participants.

Unfortunately, Millhauser argues, some of the unspoken resistance to ADR also derives from "often unstated and sometimes unrecognized human needs and desires,"<sup>224</sup> those same needs and desires which ADR

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217. See W. LINCOLN, *MEDIATION* (1976).

218. See B. Patton, *supra* note 198.

219. W. LINCOLN, *supra* note 217, at 15.

220. *Id.* at 16.

221. See Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 *NEGOTIATION J.* 29 (1987).

222. The transformation of needs into legal claims involves, in this view, a process in which the individual becomes not merely a client but a dependent of the lawyer who provides not merely a legitimate voice in the process but an authoritative vision of social relations generally. See Sarat & Felstiner, *supra* note 116; Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC'Y REV.* 93 (1986). The client must rely on the lawyer for representation within the legal process and for explanations and interpretations of that process. Along with this very expected advice, however, the client also receives what is experienced as authoritative interpretation of his or her own feelings, wants, and experiences and learns from the lawyer not only what is appropriate behavior in the legal process, but how to understand and interpret other experiences and events. Given this perception of the legal system and legal professionals, ADR is advanced as part of a general strategy of personal empowerment.

223. See Millhauser, *supra* note 221.

224. *Id.* at 29.

would work both to satisfy and to change. "Left to their own devices and instincts today, most lawyers and clients will seek to 'win' in a traditional sense," Millhauser says.<sup>225</sup> Those instincts can be transformed, she believes, by recognizing more fundamental needs for trust, cooperation, and relationship. In this view, dispute processing gets to the "core" of human personality and human character; in this view, the right form of disputing processing can encourage disputants to see themselves as essentially similar beings rather than as creatures of irreconcilable rights and interests.

Others link ADR to more comprehensive theories of needs.<sup>226</sup> Some theories rest upon a picture of universal, ontological and generic/genetic human needs transcending observable differences of race, class, or culture, in other words, human needs that transcend variations in norms, laws, social structures and institutions.<sup>227</sup> They speak of dispute resolution as aiding "individuals who seek to fulfill a set of deep-seated, universal needs . . . ."<sup>228</sup>

Based on the work of Robert Ardry, E. O. Wilson in sociobiology, Abraham Maslow in psychology, as well as research in stimulus response behaviorism, Burton<sup>229</sup> and Burton and Sandole,<sup>230</sup> following Sites,<sup>231</sup> postulate nine fundamental human needs which collectively constitute human nature: a need for consistent response, a need for stimulation, a need for security, a need for recognition, a need for distributive justice, a need to appear rational, a need for meaning in response, and a need for role defense, defined as the "protection of means and tactics that

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225. *Id.* at 34.

226. See, e.g., J. BURTON, *DEVIANCE, TERRORISM AND WAR* (1979). Burton provides one of the most synthetic formulations of this type of needs-based approach to dispute resolution which he describes as a Kuhnian "paradigm shift" in the study of conflict and conflict management. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). The shift Burton describes moves away from a model of conflict and social exchange based upon power, coercion, and zero-sum calculations, to one based upon problem-solving and "win-win" outcomes. He also moves away from institutional structural analyses which were important in interest-based dispute resolution to a social theory that places primary analytic importance upon the individual.

Avruch and Black challenge Burton's claim that his model constitutes a paradigm shift in studies of conflict. They argue that his emphasis upon individual agency and consciousness instead of social organization and institutions is simply a restatement of the debate between Freud in *Civilization and its Discontents* and Durkheim in *The Rules of the Sociological Method*. A restatement of these arguments, even an elaboration and extension of traditional arguments does not, in Avruch and Black's perspective, constitute a paradigm shift. See Avruch & Black, *A Generic Theory of Conflict Resolution: A Critique*, 3 NEGOTIATION J. 87 (1987).

227. This model of conflict, Burton claims, applies to all levels of social exchange—interpersonal, inter-organizational, international—and thus eschews any disciplinary-based (for example, psychological, anthropological, sociological) understandings of conflict which accept or respond to the reality of different levels of social interaction. J. BURTON, *supra* note 226.

228. Avruch & Black, *supra* note 226.

229. See J. BURTON, *supra* note 226, at 72-73.

230. See Burton & Sandole, *Generic Theory: The Basis of Conflict Resolution*, 2 NEGOTIATION J. 333 (1986).

231. See P. SITES, *CONTROL: THE BASIS OF SOCIAL ORDER* (1973).

actors develop for purposes of protecting and fulfilling needs.”<sup>232</sup> “Conflicts,” Burton and Sandole argue, “may involve . . . not a clash of basic needs as such but a clash of . . . culturally determined ways in which needs are expressed.”<sup>233</sup> Rights talk, for example, is one such culturally determined way of expressing our essential needs. Thus the reconstitution of the juridical subject requires a confrontation with the language of rights which both artificially generates conflict and contributes to human alienation.<sup>234</sup> Proper techniques of conflict management do not just respond to dominant cultural motifs for expressing needs. They transform culture itself by making available “better” modes for expressing and realizing our needs.

This argument suggests that conventional models of conflict begin with erroneous assumptions about scarcity and differences between individuals and groups. As against those assumptions, Burton argues that social goods, associated with the nine basic human needs are not limited and, indeed, may increase through use and exchange.<sup>235</sup> Thus for example, identity, security, and responsiveness, are not, in his view, in short supply and can be increased by greater interaction and exchange. However, positional goods, those attached to specific social roles, for example leadership and prestige, may be in relatively short supply. These are not, however, truly fundamental human needs nor do they respond to basic human nature. Thus persistent conflict is, in this argument, a surface problem, one which is exacerbated through the constitution of the juridical subject in terms of rights or interests. Identification of shared needs provides a basis for the resolution of particular disputes and, more importantly, for building a more harmonious social life.<sup>236</sup>

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232. Burton & Sandole, *Expanding the Debate on Generic Theory of Conflict Resolution: A Response to a Critique*, 3 *NEGOTIATION J.* 97 (1987).

233. Burton & Sandole, *supra* note 230, at 343.

234. It is to this type of confrontation that Fiss responds. See Fiss, *supra* note 1.

235. J. BURTON, *supra* note 226.

236. Burton and Sandole suggest that the juridical subject as traditionally conceived is based on untested and untheorized assumptions about order, harmony, conformity and the role of law in meeting these needs. The extensive and apparently successful movement for alternative dispute resolution, they claim, signifies a shift away from these conventional, perhaps mythical, understandings to scientifically based explorations of the specific ways in which institutions and motivations can be harmonized with human aspirations. Thus contemporary dispute resolution promises to reconceptualize the juridical subject to conform to the logic and insights of the human sciences. See Burton & Sandole, *supra* notes 230, 232.

Milner, Lovaas and Adler describe the prevalence of this conception of human needs in a series of rather diverse ADR programs. They find that the six mediation programs they studied vary in organizational structure and goals and the degree to which the program seeks to transform subject/authority and public/private distinctions in contemporary American society. Nonetheless, they share a common vision of conflict and human needs that transcends the differences between them. See N. Milner, K. Lovaas & P. Adler, *The Public and the Private in Mediation: The Movement's Own Story* (1987) (working paper for Program on Conflict Resolution, University of Hawaii). Milner, Lovaas and Adler argue that the program differences may be homogenized by a “myth of relationships” which conceptualizes human subjectivity in terms of the needs of the private self rather than in terms of entitlements, as in the conception of rights. “Contemporary North American mediation programs may share an overriding singularly unanimous vision of mediation as a discourse in which the language of interdependence, relationships and interests dominate.” *Id.* at 26. This “relational language of mediation often stresses the need for the

*The Significance of the Shift From Rights to Interests and Needs*

Rights, interests and needs appear to derive from, and participate in, different epistemologies and, coincident with those alternative knowledge claims, appear to provide different rationalizations for competing sources of authority. Each vision seems to constitute a different human subject; each constitutes its own grounds for legitimate legal and political debate and for activity within the legal field. Each, however, displays a similar set of contradictions within itself, and, in so doing, each reinforces, even as it critiques, the claims of the other. Each plays out a set of complicated relationships between and among autonomy and connectedness, self and community.

While the jurisprudence of rights, with its associated focus on courts as the proper institutional location for authoritative interpretations of those rights, has been criticized for expanding the domain of legal authority beyond reason, and for obscuring and mystifying the grounds of human interaction,<sup>237</sup> judgments between conflicting rights both distinguish among alternative moral claims and establish grounds for human connection. Rights arguments carve a space for legitimately generalizing an individual's preferences by saying that what is good for me may also be good for you.<sup>238</sup> Thus in articulating my claim, I stake a claim for you as well.

Although rights talk in its classical formulations may seem to constitute an alienating individualism, as the radical critique suggests, its voice, nonetheless, creates a recognizable way to understand social life, that is, what constitutes "we" rather than solely "me." There is a way in which rights make possible the kind of community, interaction and connection sought in the discourse of needs at the very moment that they seem to encapsulate individuality, separateness and difference. Thus, one might ask, what the movement for ADR offers in place of the contradictions of legal rights? What does the discourse of interests and needs offer as grounds for political debate and social decisions? How does it conceptualize "me" and "we"?

While the critique of rights empowers advocates of ADR, the discourses of interests and needs fail to solve the contradictions of rights talk. At first glance, the turn to interests flattens human interaction to a marketed exchange of preferences<sup>239</sup> while the move to needs suggests a more complex but unfortunately essentialist ground for interaction.

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private self to emerge and to be expressed more freely . . . . The myth conceptualizes interactions between parties in terms of their interests rather than in terms of entitlement and obligations." *Id.* at 2. "Subscribers to this myth believe that relationships emphasizing interests rather than rights, bring us closer to ourselves and to valuable cultural tools whose existences have been threatened by modern life." *Id.* at 3. Finally, "decisions based on relationships will be implemented successfully enough to bring about important political and social change." *Id.* at 26. Cf. Silbey & Merry, *Mediator Settlement Strategies*, 8 *LAW & POL'Y Q.* 7 (1986).

237. See R. UNGER, *POLITICS* (1987).

238. See Minow, *supra* note 167.

239. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

In one vision, the alienating aspects of individual rights are extended so that the juridical subject is not simply treated for limited purposes as an individual but is thoroughly isolated into a set of behavioral responses, wants and preferences. Yet this vision cannot convincingly demonstrate that juridical subjects begin in, or aspire to, a condition of perfect competition for the maximization of those wants and preferences. As Coleman argues, it is equally compatible with the idea that human subjectivity is basically a series of preferences to assume cooperation as the original condition.<sup>240</sup> Thus the conception of the juridical subject in interest terms replicates the contradiction between self and other which plagues the rights conception.<sup>241</sup>

In the move to needs the juridical subject is provided with a more complicated, richer human character. Yet that character stands at some distance from itself and, as a result, presents an incomplete understanding of "real" needs. While we may know what we want, that very knowledge is believed to prevent us from clearly seeing or articulating our needs.<sup>242</sup> As a result, the juridical subject is never complete without an external reference helping to sort out the short-term expression of wants from the long-term recognition of essential needs. Self is again made possible by the mediation of other.

The move to interests makes preferences and wants the basis of the juridical subject and seems to challenge rights discourse's inherent need to generalize or join individual claims in an interactive moral engagement. Interest claims seem both individuated and irreconcilable because human wants are understood to be the constitutive elements of distinct and separate human personalities—no two are ever the same. Personality is, in this view, the unique prism of an ontological, physical individuality which generates competitive and distinct preferences as a direct product of that ontological separateness. The legal field should function in this view to maximize the realization of individual preferences by imposing the fewest possible moral constraints on the allegedly free activities of individuals. The activity of legal professionals should be as much technical or instrumental as moral or philosophical.<sup>243</sup>

Interest-based dispute processing while emphasizing the seemingly irreconcilable individuality of wants and preferences insists upon their uncompromisability. ADR proponents consider interests, preferences and wants compromisable because interests and wants are understood behaviorally. Wants and preferences are seen as responses to a bundle of ever-changing experiences and stimuli. Those responses are understood as if they were distinct from the social or moral context which gives them meaning and value; only by ignoring that context can interest-based dispute resolution deny to third-party dispute handlers any le-

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240. See Coleman, *Competition and Cooperation*, 98 ETHICS 76 (1987).

241. See Kennedy, *supra* note 181.

242. See I. ILLICH, *TOWARDS A HISTORY OF NEEDS* (1977).

243. See B. ACKERMAN, *supra* note 60.



gitimate claim to look behind or beyond the articulated preferences of the disputants.

The focus on interest requires, even as it denies, the exploration of the basis of competing claims and the social or moral grounds which sustain them. Yet it often does not develop a language with which to deal with those issues. It is not surprising, therefore, that the written agreements produced through negotiation and mediation, agreements which articulate the compromises and "shared" interests uncovered and constructed through "creative problem solving," often read like sets of performance instructions and indicators.<sup>244</sup> Such agreements transform structural and normative disputes into behavioral strategies which side-step or ignore the sources of difference<sup>245</sup> even as they flatten the basis

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244. See Nelken, *The Use of "Contracts" as a Social Work Technique*, in *CURRENT LEGAL PROBLEMS* (1987).

245. Kolb reports on the ways in which organizational ombudsmen, charged with mediating conflicts within formal organizations such as corporations and universities, pacify complainants by removing them from their situations of distress. See Kolb, *Corporate Ombudsmen in Organizational Conflict Resolution*, 31 *J. CONFLICT RESOLUTION* 673 (1987). Ombudsman routinely arrange transfers of employees from one department to another when employees report situations of conflict, harassment, inefficiency, neglect of duty and the like. The ombudsman becomes the mechanism for legitimating and facilitating exit and avoidance. Cf. A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970); Felstiner, *Influences of Social Organizations on Dispute Processing*, 9 *LAW & SOC'Y REV.* 63 (1974). Moreover, the ombudsman's ability to act is predicated upon strict confidentiality and an explicit agreement that the ombudsman will deal only with parties who voluntarily seek the ombudsman's help. Therefore, the relevant parties and interests for the ombudsman must be limited to the situation presented to the third party. It follows that no records are kept, and no patterns of complaint can be constructed in order to respond to systemic sources of dispute. Cf. Abel, *supra* note 93; Silbey, *supra* note 97. Such interest focused negotiation turns all disputes into problems of behavior. Silbey and Merry describe the ways in which differences in cultural expectations about what constitutes a good person or what is required to be a neighbor, are transformed in mediation into instructions about how to behave when these disagreements prove unavoidable. Since the mediator cannot ally with one or another conception of the good wife or the good father, and the parties have not been able to agree about what is required for these roles, the solution is an agreement about what to do when disagreements become unendurable. Silbey & Merry, *supra* note 236.

The behaviorizing consequences of ADR are seen most clearly in interpersonal disputes. It has been observed repeatedly, for example, that in labor negotiation and mediation, the field of ADR with the longest and most respected history, the employment relationship has been reduced to a set of behavioral rules. Rather than a discourse about how we might organize materials and manpower to sustain and improve human life, employment and production has been turned, in Dunlop's phrase, into a "web of rules" about hours, pay and working conditions. Although it is widely reported that shortly after World War II, Walter Reuther, at the time head of the United Auto Workers, asked the management of General Motors to enter a partnership with labor to develop methods of more efficient automobile production, or at least to discuss a variety of means of organizing that production. General Motors considered those issues irrelevant to labor/management negotiations. Cf. H. KATZ, *CHANGING GEARS* (1985).

Kolb describes in great detail the ways in which labor negotiations turn the employment relationship into a set of measures and behavioral instructions. See D. KOLB, *THE MEDIATORS* (1985). She describes how negotiations are orchestrated to produce settlements by ignoring, and sometimes denying, the framework of assumptions which allows the negotiations to continue and by removing from contention the issues which cannot be transformed into commodity and behavioral exchanges. Kolb's work describes how mediators who work for a federal mediation agency organize their work—the scheduling of meetings, the appropriate topics of conversation, the dimensions of better or worse agreements—on the basis of a set of cognitive maps which define for them the meaning of labor

of connection which make them possible.

Because the constitution of the juridical subject in terms of needs seems to assert the existence and primacy of an historically developed but nonetheless essential human nature,<sup>246</sup> it appears rooted in a search

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negotiation. The mediator's activities take place within a framework of assumptions about the relative roles and rights of capital and labor, the appropriate issues for negotiation, and the place of the state in these relationships. This ideology of free collective bargaining assumes the legitimacy of strikes in labor conflict and denies a legitimate role for government or any outsider in collective bargaining. Although these issues frame the negotiations, they are never explicitly discussed and the negotiations become a process of trading chips that never threaten to expose the lines of cleavage and disagreement. These frames, both at the industry level and the macro-sociological level, constrain both the methods and issues in negotiation, although they never surface for discussion. The history of labor negotiations thus becomes a story of the ways in which contested moral ground can be denied and excluded by effective dispute resolution.

Many proponents of interest-based negotiation deny the charge that attention to "interest" necessarily leads to disaggregation, individuated or merely behavioral responses. They argue that the negotiator must encourage the parties to explore a wide range of possible interests and must delve beneath surface preferences. As we have already seen, advocates of ADR claim that the process of dispute resolution itself encourages a readjustment of personal values and attitudes as well as behavior. But this concern to guard against the narrowing conceptions of articulated wants and preferences raises troublesome issues about the authority and legitimacy of the third-party dispute handler. At what point is this person a facilitator of communication between the parties and at what point does this facilitation become instruction and leadership? Moreover, what set of professional norms, and what social theories, govern the mediator's exploration and possible construction of underlying interests? If third parties lead disputants to places, claims, and values, that the parties had not themselves articulated or been conscious of, how can one claim that the third party lacks power? If the mediator's social and economic theories about what constitutes underlying interests shape the manner in which the dispute is understood by the parties, what is the distinction between informal dispute resolution and formal dispute resolution through law? Are third parties exercising authority and power without accountability? Are third parties practicing law without rights? Or are they possibly practicing politics without a constituency? Cf. Mather & Yngvesson, *supra* note 116.

The responses move in two directions. In one approach, third party mediators are advised to develop criteria of fairness and justice by which to assess the quality of negotiations and agreements; they are encouraged to develop a moral discourse about mediation. Thus in various descriptions of public issue negotiation, Susskind suggests a set of questions which third party facilitators should address to determine whether interests have really been met, to make sure they have successfully delved beneath surface claims so that the solutions achieved meet the real interests of the parties. See L. SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987). These questions or criteria for professional mediation of public disputes constitute, without so naming them, a jurisprudence of mediation. They lack, however, any mechanism for checking the individual mediator's performance or holding the mediator accountable for her personal assessments of fairness and justice. Moreover, the moral discourse of mediation is conceived of as a personal morality of professional mediators and as a standard for professional achievement. The second direction in which interests are pushed beyond articulated preferences and wants, side-steps the criticisms and calls for responsiveness by dispute handlers to parties' fundamental needs.

246. Ignatieff's conception of "need" points to essential elements of human subjectivity, but posits these as nonetheless historical and relative. We create needs for ourselves; "we are the only species with the capacity to create and transform our needs, the only species whose needs have a history." M. IGNATIEFF, *THE NEEDS OF STRANGERS* (1984). Thus the only needs which we can specify are those "absolute prerequisites for any human pursuit . . . because whatever we choose to do with our lives, we can scarcely be reconciled to ourselves and to others without them." *Id.* at 14.

In the end, a theory of human needs has to be premised on some set of choices about what humans need in order to be human; not what they need to be happy or free, since these are subsidiary goals, but what they need in order to realize the full extent of their potential. There cannot be any eternally valid account of what

for objectivity that is absent in the analysis of wants, desires and preference. Moreover, the force of a needs claim derives in part from that perceived objectivity.<sup>247</sup> Although some welfare economists claim that the only thing that ultimately matters is the satisfaction of wants, proponents of needs discourse argue that something much more basic is at stake. In making such an argument, Thompson for example, suggests that the failure to meet needs implies serious harm;<sup>248</sup> harm cannot be defined in terms of either actual desires or well-informed wants, the grounds of utilitarian reasoning, because we can need something without knowing that we do.<sup>249</sup> Here again we see the external, objective perspective which informs needs discourse, a perspective which suggests the radical incompleteness of the juridical subject.<sup>250</sup>

Although needs discourse describes a dependent juridical subject, public discourse about needs points to much more than the basic necessities of survival. "To define human nature in terms of needs is to define what we are in terms of what we lack, to insist on the distinctive emptiness and incompleteness of humans as a species."<sup>251</sup> The discourse of needs portrays the human tragedy wherein the spiral of created, recreated and escalated needs render subjects impotent to meet needs of which they are aware only when they are connected to others. The lack of that connection stimulates the recognition of the need.

Needs talk in politics or dispute resolution thus generates at least two types of dependency. There is the logical, syntactical dependency which Nancy Frazer describes as "in order to" statements.<sup>252</sup> Needs

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it means to be human. All we have to go on is the historical record of what men have valued most in human life.

*Id.* at 15.

247. Cf. D. BRAYBROOKE, *MEETING NEEDS* (1987); D. WIGGINS, *NEEDS, VALUES, TRUTH* (1987).

248. See G. THOMSON, *NEEDS* (1987).

249. Thus Thompson argues that the normative claim of need is much stronger than a claim for wants because desires are clearly not preemptory in the way that harm is. Brian Barry writes that "we tend to think that needs possess a kind of preemptory status that mere desires lack; if you say you need something you seem to be presenting a weightier claim than if you say you want it." See Barry, *Priorities of the Selfgovlisset*, N.Y. Times, Feb. 5, 1988, Literary Supplement, at 140. Further, Wiggins provides an elaborated version of the absolute or normative claim of need: "The thought we have now arrived at is that a person needs *x* [absolutely] if and only if . . . he will be harmed if he goes without *x*." D. WIGGINS, *supra* note 247, at 14. His discussion explores the ways needs are entrenched within future expectations, are substitutable, immediate and urgent, basic, etcetera.

250. The discourse of "interests" suggests no such incompleteness: No one can know my wants or preferences better than I. Thus it makes no sense to suggest that in the articulation of those preferences I am in any way dependent on others.

251. See M. IGNATIEFF, *supra* note 246, at 14.

Rights language offers a rich vernacular for the claims an individual may make on or against the collectivity, but it is relatively impoverished as a means of expressing individual's needs for the collectivity. It can only express the human ideal of fraternity as mutual respect for rights, and it can only defend the claim to be treated with dignity in terms of our common identity as rights-bearing creatures. Yet we are more than rights-bearing creatures and there is more to respect in a person than his rights . . . . It is because money cannot buy the human gestures which confer respect, nor rights guarantee them as entitlements, that any decent society requires a public discourse about the needs of the human person.

*Id.* at 13.

252. See N. Frazer, *Talking About Needs: Cultural Constructions of Political Conflict in*

have a relational structure, "x needs y in order to," describing needs claims as a nested series or chains of such "in order to" statements. Thus needs, in contrast to the things needed, are "states of dependency which have as their proper object things x needed."<sup>253</sup> However, there is also a material and behavioral dependency which develops historically through the social and political creation of needs. Offers of help and provision of service create needs, discourage self reliance, and thus foster a sense of incompetence and dependency.<sup>254</sup>

But the discourse of need, even as it establishes human interdependence, creates a domain of independent authority for those who specify and service human needs.<sup>255</sup> By asserting the existence of shared and objective grounds for dispute resolution, the concept of need denies legitimacy to those who disagree about what is needed, or who is needy, while empowering those who work within the "uncontested" arena. By mobilizing the discourse of need, proponents of ADR remove specific areas of human interaction from political and moral argument, or what appears to be interminable and ineffective debate, and in so doing empower alleged experts. Thus needs discourse, like the discourses of rights and interests, embodies claims to both connection and separateness.

The movement from rights to interests might have exaggerated the political dimensions and inefficiencies of dispute resolution by challenging the possibility of collective or disinterested grounds for settlement of differences except through market transactions. The move to needs, however, suggests the possibility of not only disinterested but relatively unproblematic grounds for dispute resolution. When deployed by ADR advocates, needs talk is of this latter type, apolitical and distinctly technocratic.

Needs-based dispute resolution takes for granted the desire of expert helpers to meet needs, and defines the dispute as merely a technical and individual problem of correlating available means to essential needs. Disputes are no longer arenas of competition for the distribution of valued goods, or the legitimation of moral claims. Dispute resolution becomes a technocratic activity because it is defined as the creation or design of pragmatic solutions to problems. Compromise between the parties allows people to live with their problems. Here the claim is made that all problems can be solved. As such, dispute resolution is similar to many other forms of engineering in which knowledge is mobilized to achieve material and behavioral goals.<sup>256</sup> What technology produces, however, is not only the creation of solutions but the

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Welfare State Societies (Feb. 3, 1988) (talk presented to Mary Ingraham Bunting Institute, Radcliffe College, Cambridge, Mass.).

253. See D. WIGGINS, *supra* note 247, at 16.

254. See I. ILLICH, *supra* note 242. Cf. Abel, *supra* note 93, at 283; R. TOMASIC, *LAWYERS AND THE COMMUNITY* 22-25 (1978).

255. See I. ILLICH, *supra* note 242; J. HABERMAS, *TOWARD A RATIONAL SOCIETY* (1970); C. LASCH, *supra* note 97.

256. See M. HEIDEGGER, *BASIC WRITINGS* (1965).

externalization of guidance, which specifies the relationship between means and ends—the solutions to problems.<sup>257</sup> Because technocratic problems involve control through explicit and exhaustive instructions and rules, they appear to be independent of human will; thus, technological decision making is presented by its promoters to be apolitical and uncontroversial.<sup>258</sup> By legitimating a conception of dispute resolution that is simultaneously independent of the articulated preferences, wants or interests of the parties, and independent of the historical context of collective wants and preferences embodied in rights, the discourse of needs enables a form of dispute resolution that also seems outside of power or authority while it nonetheless gives independence to experts who can specify the correct relationship between relatively unproblematic needs and available means.<sup>259</sup>

Constituting the juridical subject in terms of needs thus makes possible some of the institutional critiques of courts which we described in Part II. Judges think in terms of rights and are, as a result, not able to get to what is 'really' at issue. As a result, so the argument goes, needs are unmet; moreover, the language of rights is said to overlay and prevent the recognition of either the sources or nature of the conflict. Thus conflict continues or takes new forms.<sup>260</sup>

## V. CONCLUSIONS

The emergence of disputing and dispute processing within the legal field takes place at several interdependent levels. At each level dispute processing involves both a competition among different professional projects and an incorporation of different professional projects within

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257. What else is a computer or any machine but a set of instructions formulated for endless production? Nonetheless those instructions are specified by people whose job it is to create such formulas. See J. WEIZENBAUM, *COMPUTER POWER AND HUMAN REASON* (1976).

258. See Bittner, *Technique and the Conduct of Life*, 30 *SOC. PROBS.* 249 (1983). Thus the discourse of "needs" imagines a dispute handler in much the same way that some varieties of liberal theory imagines judges. See Singer, *supra* note 177.

259. It also neutralizes and depoliticizes disputes by offering to meet needs through creative, responsive and participatory problem-solving; nonetheless the needs pursued through participatory dispute processes may not be the needs the parties articulate or desire. Thus Delgado criticizes ADR for the ways in which it denies to minority and impoverished populations the ability to make a social claim against the collectivity, to get that claim validated as legitimate for others as well as the individual complainant, and to demand a response from more than the particular respondent. See Delgado, *Fairness and Formality*, 1985 *WIS. L. REV.* 1359. Law, Delgado argues, necessitates that others, not party to the particular dispute, nonetheless acknowledge the legitimacy of the claims of the prevailing party. By denying dispute resolution on grounds other than the particular interests of the specific parties, ADR closes the door to those who seek affirmation that they are not alone in their wants or needs. Needs-talk, like interest-negotiation, responds to the individual claimant but denies that person's desire to have her want acknowledged by the community. Moreover, Delgado argues that minority populations have particular needs for processes of dispute resolution which challenge racial and ethnic prejudice, and which empower the disadvantaged. Such groups, Delgado suggests, do not want, nor do they need, dispute resolution forums which are neutral and disinterested. Inequalities of status and power demand institutions which provide partisanship rather than unchannelled responsiveness and participation.

260. See Felstiner, Abel & Sarat, *supra* note 116.

the legal field. Within the domain of legal institutions, elite lawyers, access to justice reformers and community organizers compete to control the market in dispute processing just as in the domain of legal scholarship social scientists contest the hegemonic position of traditional law professors by reformulating the subject of law as disputing and dispute processing. Yet each of these contests takes place within the legal field and is fully contained within it just as each brings new professional projects within its reach. Moreover, competition within each domain is made possible by developments within the other. Theoreticians provide new weapons for combat over, and within, institutions just as that combat energizes and legitimates theoretical production. Competition and interdependence are also visible in the constitution of the juridical subject. Here the explicit rhetoric is a rhetoric of competition and displacement, yet, as we have shown, the discourses of rights, interest and needs embody similar contradictions between autonomy and connection, individuality and sociality, separateness and relationship.

Thus, to speak of the reconstitution of the juridical subject or the transition within the legal field from rights to interests and needs suggests more completeness than is attained or attainable. Rights talk is by no means displaced;<sup>261</sup> it is, however, transformed, and, in some ways domesticated, in the face of the discourses of interest and needs. The rights language of Dworkin,<sup>262</sup> Fiss<sup>263</sup> and Minow<sup>264</sup> is recognizably modern and different, perhaps less terrifying and compelling than the rights discourse of earlier eras.<sup>265</sup> Unalienable rights become products of a judicially-led process of textual interpretation. Rights become parts of the fabric of social life rather than constraints existing outside or prior to it. Alternatively, in other voices, rights no longer serve as guarantees against non-interference or the sanctity of an inviolable personal space;<sup>266</sup> they aren't guarantees that individuals can dictate or control the uses of their own persons or property. They become, instead, guarantees that when others make particular decisions regarding my person or my property I will have a claim to a judicially enforced obligation to payment for their preferred uses. This domesticated rights talk represents a discursive accommodation of significant proportions. It makes possible an uneasy pluralism of communities with the legal field.<sup>267</sup> No longer is rights talk a hegemonic form; no longer does the juridical subject as a possessor of rights reign supreme. At the same time, however, ADR has not been able, itself or in combination with other things, to dislodge the rights conception.

In addition, the language of rights reshapes and challenges the way

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261. See Haskell, *The Curious Persistence of Rights Talk in the "Age of Interpretation"*, 1988 J. AM. HIST. 1.

262. See R. DWORKIN, *supra* note 154.

263. See Fiss, *supra* note 1.

264. See Minow, *supra* note 167.

265. See H. ARKES, *supra* note 156.

266. See Calabresi & Malamed, *Property Rules, Liability Rules and Inalienability*, 85 HARV. L. REV. 1089 (1972).

267. See Minow, *Law Turning Outward* (1987) (unpublished manuscript).

interests and needs are expressed in debates over dispute processing. The latter take on meaning only as theoretical counterweights to rights. Interests and needs become, if nothing else, alternative bases for claims of rights. Moreover, while the language of interests and needs seems at first to strengthen strains of opposition within the legal field, it serves in the end to strengthen the social position of the legal field by making it more complex and resilient, by selectively incorporating, and making accommodations with, political opponents and by extending the sphere of surveillance and control that gives the legal field its place within society. ADR by precipitating accommodations at the level of institutional practice, academic theorizing and the constitution of the juridical subject supplements rather than displaces the force of law and the social space which it occupies.